115 U.S. 577.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 913.

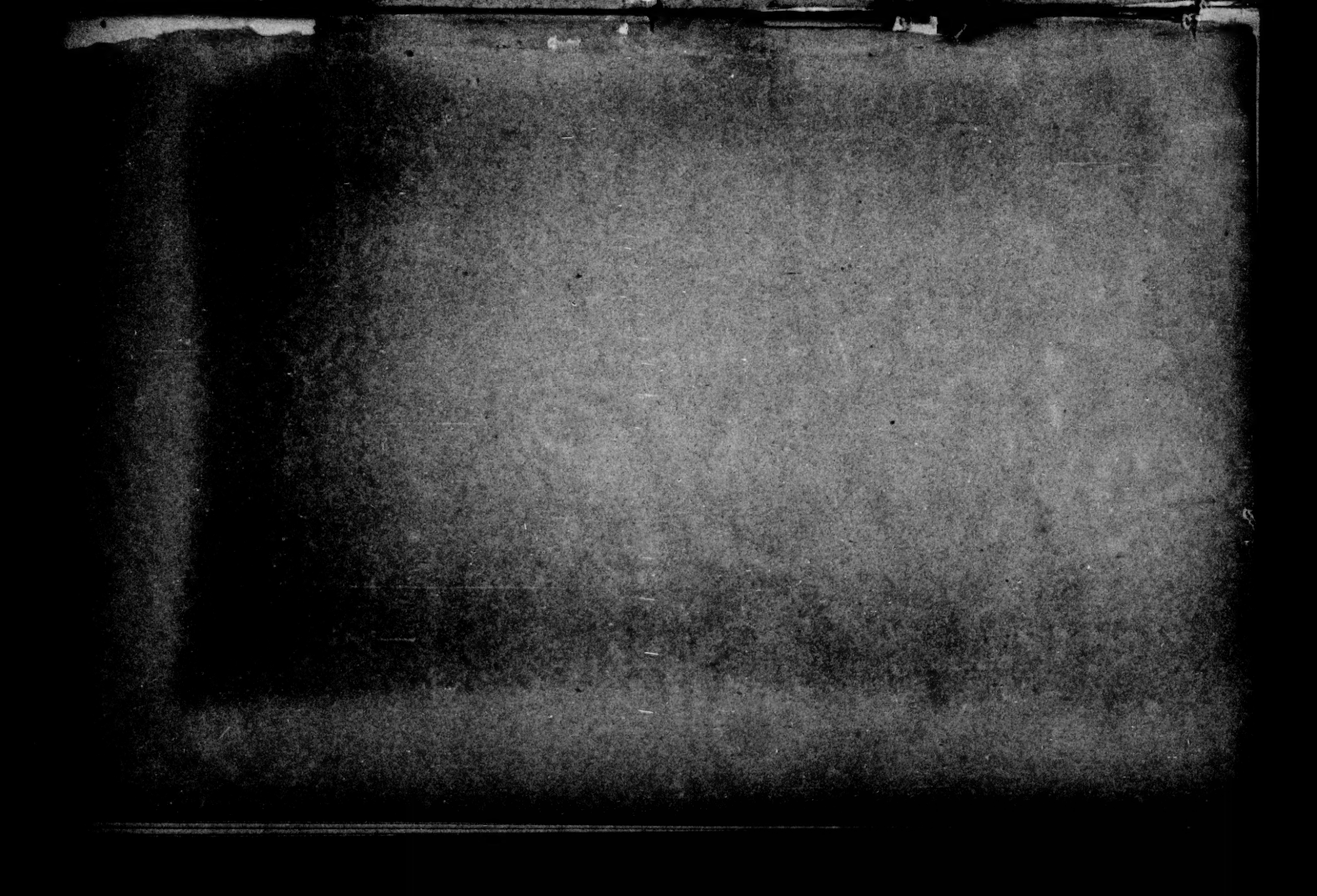
CHARLES C. HARRISON, THEODORE A. HAVEMEYER, ALFRED C. HARRISON, WILLIAM W. HARRISON, AND WILLIAM W. FRAZIER, JR., PLAINTIFFS IN ERROR,

vs.

EDWIN A. MERRITT, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 10, 1885.



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UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Charles C. Harrison, Theodore A. Havemeyer, Alfred C. Harrison, William W. Harrison and William W. Frazier, Junior, plaintiffs, and Edwin A. Merritt, defendant, a manifest error hath happened to the great damage of the said Charles C. Harrison, Theodore A. Havemeyer, Alfred C. Harrison, William W. Harrison, and William W. Frazier, Junior, plaintiffs, as by their complaint appear: We being willing that the error, if any hath been, shonld be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-five, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 6th day of August, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal of the U. S. Circuit Court, South. Dist., New York.]

TIMOTHY GRIFFITH, *Clerk.*

The forgoing writ is hereby allowed.

Aug. 6, 1885. ADDISON BROWN.

2 [Endorsed:] U. S. Supreme Court. Charles C. Harrison, Theodore A. Havemeyer, Alfred C. Harrison, William W. Harrison, and William W. Frazier, Junior, plaintiffs in error, against Edwin A. Merritt, defendant in error. Writ of error. Service of copy of within notice is hereby admitted, this 6th day of August, 1885. Wm. Dorsheimer, U. S. att'y. [Stamped:] U. S. circuit court. Filed Aug. 6, 1885. Timothy Griffith, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, by

3 virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from four to sixty-five, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Charles C. Harrison, Theodore A. Havemeyer, Alfred C. Harrison, William W. Harrison, and William W. Frazier, Junior, plaintiffs in error, against

Edwin A. Merritt, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this sixth day of August, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and tenth.

[Seal of U. S. Circuit Court, South. Dist. of New York.]

TIMOTHY GRIFFITH, *Clerk.*

4 *Summons.*

Superior Court of the City of New York.

CHARLES C. HARRISON, THEODORE A. HAVEMEYER, ALFRED C. HARRISON, WILLIAM W. HARRISON, WILLIAM W. FRAZIER, Jr., Plaintiffs,

against

EDWIN A. MERRITT, Defendant.

To the above-named defendant, Edwin A. Merritt:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, New York, Nov. 14, 1881.

ISAAC PHILLIPS,
Plaintiff's Attorney.

Office and post-office address: Isaac Phillips, No. 59 Liberty street, New York city, N. Y.

5 [Endorsed:] Superior court city of New York. Charles C. Harrison & others ag'st Edwin A. Merritt. Summons. Isaac Phillips, plaintiff's attorney, 59 Liberty St., N. Y.

6 The President of the United States of America, to the judges of the superior court of the city of New York, Greeting:

[L. S.]

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Edwin A. Merritt, defendant, by Charles C. Harrison & *al.*, plaintiffs, do therefore commaind you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 5th day of Dec'r, 1881, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, Esquire, Chief Justice of the Supreme

Court of the United States, the 30th day of Nov., in the year one thousand eight hundred and eighty-one.

JOSEPH M. DEUEL, *Clerk.*

STEWART L. WOODFORD,
United States Attorney, Attorney for Defendant.

7 [Endorsed:] 7454. U. S. circuit court. Charles C. Harrison & *al. versus* Edwin A. Merritt. *Certiorari.* Stewart L. Woodford, United States attorney, attorney for defendant.

Due service of a copy of the within and of the above notice is hereby admitted.

ISAAC PHILLIPS,
Plaintiff's Att'y.

Bill of Particulars.

(1) Suit commenced Nov. 14, 1881.

Name of importer.	Description of merchandise.	Place whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom house.	Amount of excess claimed.	Date of payment.	Date of filing protest.	Date of appeal to Sec'y of Treasury.	Date of decision on appeal.
				1881.	1881.		1881.	1881.	1881.	1881.
Charles C. Harrison, Theodore A. Havemeyer, Alfred C. Harrison, William W. Harrison, William W. Frazier, Jr., composing firm of Harrison, Havemeyer & Co.	Bones—burned, calcined, ground, or steamed.	London...	Persian Monarch.....	June 11, '81	June 27, '81	$1,761 00	July 30, '81	Aug. 2, '81	Aug. 2, '81	Aug. 17, '81
		London...	Persian Monarch.....	Ap'l 23, '81	May 21, '81	4,994 75	July 30, '81	July 28, '81	July 28, '81	Oct. 1, '81
		Havre.....	Hermdel.....	June 3, '81	June 22, '81	469 00	July 30, '81	July 28, '81	July 28, '81	Oct. 1, '81
						7,224 75 P'd.				

9 Superior Court.

CHARLES C. HARRISON & others *against* EDWIN A. MERRITT. (1)

NEW YORK, *November* 28, 1881.

SIR: Please take notice that the following or within is a bill of particulars of the plaintiff's demand in this action, which is brought to recover money erroneously and illegally exacted of and from the plaintiffs by the defendant, as collector of customs of the port of New York, and as for duties on merchandise imported in the vessels and at the dates specified in said bill of particulars, to which add legal interest on the amounts from the dates of payment, as aforesaid.

Yours, &c., ISAAC PHILLIPS,
Plaintiffs' Attorney.

STEWART L. WOODFORD, ESQ.,
Defendant's Attorney.

[Endorsed:] N. S. 7454. Superior court. Charles C. Harrison & others ag't Edwin A. Merritt. Bill of particulars. Isaac Phillips, attorney for plaintiffs. Due service of copy of within bill of particulars and notice is hereby admitted. New York, ——, 188–. ——, attorney for defendant.

10 *Complaint.* (1.)

Circuit Court of the United States for the Southern District of New York.

CHARLES C. HARRISON, THEODORE A. HAVEMEYER, Alfred C. Harrison, William W. Harrison, & William M. Frazier, Jr., Plaintiffs,
against
EDWIN A. MERRITT, Defendant.
} N. S. 7454.

Plaintiffs complain:

1st. That defendant was, during the times hereinafter named, collector of customs of the United States at the port of New York.

2d. That plaintiffs were, during said times, partners in trade, under the firm name of Harrison, Havemeyer & Co., and as such duly imported and entered at the port of New York the goods described in the bill of particulars annexed, and as served on defendant or his attorney.

3d. The defendant, as such collector, exacted from plaintiffs, as and for duties thereon, viz, at the rate of twenty-five per centum ad valorem.

4th. That by the laws of the United States the said goods were entitled to free entry and were exempt from duty, being "bones burned, calcined, ground, or steamed," but plaintiffs, in order to obtain said goods, were compelled to pay the defendant, as such collector, the sum of seven thousand and two hundred twenty-four $\frac{75}{100}$ dollars, in gold coin of the United States, in excess of the amount required by law.

5th. That plaintiffs filed with said defendant due and timely protests, in writing, upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

6th. That plaintiff- made due and timely appeals, in each case, to the Secretary of the Treasury, who has affirmed the decision of defendant as to certain of said entries, and as to the rest of said entries has neglected to answer said appeals, and more than ninety days had elapsed since said unanswered appeals when this action was commenced.

7th. That the bill of particulars hereto annexed, and as served on defendant or his attorney, states for each importation separately the date of entry at the custom-house of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury, and of his decision thereon, together with the other particulars required by law, and is made a part hereof.

8th. That said sum, so exacted as aforesaid, has never been repaid to plaintiffs, and is still due and owing to them.

Wherefore plaintiffs demand judgment against defendant for seventy-two hundred & twenty-four $\frac{75}{100}$ dollars in United States gold coin, with interest on the several sums named in the bill of particulars, from the several dates of payment as appear thereby, together with costs and disbursements of this action.

ISAAC PHILLIPS,
Attorney for Plaintiffs.

11 STATE OF NEW YORK, }
City and County of New York, } *ss:*

—— ——, of the plaintiffs, being duly sworn, says: He has read the foregoing complaint; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

—— ——.

Signed and sworn to before me, ———, 188—.

—— ——.

[Endorsed:] N. S. 7454. United States circuit court. Charles C. Harrison & others against Edwin A. Merritt. Complaint. Due service of a copy hereof is hereby acknowledged this —— day of ———, 188 . —— ——, att'y for def't. Isaac Phillips, pl'ffs' attorney, 59 Liberty street, New York city.

12 United States Circuit Court, Southern District of New York.

CHARLES C. HARRISON *& al.*
versus
EDWIN A. MERRITT, Collector, etc.

The answer of the defendant herein, by Stewart L. Woodford, his attorney, to the complaint of the plaintiffs in the above-entitled action.

I. He admits he was, at the times in said complaint mentioned,

collector of the port of New York, and in such official capacity received payment from the plaintiffs for and on account of duties due to the United States, under the laws thereof, upon certain importations of merchandise imported by said plaintiffs into the port of New York from foreign countries.

II. He alleges that any and all moneys received by him from plaintiffs, at the times in said complaint mentioned, were paid by said plaintiffs as a debt due by them to the United States, and not otherwise, and were received by defendant, by virtue of his office as said collector and under the direction of the Secretary of the Treasury, and for and on account of the United States, and were forthwith thereafter, and before the commencement of this action, or the service of any protest, paid into the Treasury of the United States; and that the amount of said moneys, so received from plaintiffs, were the amounts due from them to the United States, according to the rate of duty imposed by law upon the several articles of merchandise by them imported and assessed with the duty, and no other sums than duties regularly assessed, and ascertained and liquidated, according to law, upon the plaintiffs' import entry thereof were collected or received by defendant from the plaintiffs.

III. And defendant further answering denies that he has at this time sufficient information to form a belief as to the precise description of the merchandise contained in the several packages referred to in the said complaint, by the marks and numbers and description there given, except in so far as to state, and defendant herein answering doth aver and state, that said merchandise was not dutiable, according to the laws of the United States, at the rates specified in the complaint.

IV. And defendant further answering admits that plaintiffs filed with defendant certain protests, but he denies that he has sufficient information to form a belief as to whether, upon the importations in question, protests and appeals were made by the plaintiffs conformable to the laws of the United States; and defendant leaves plaintiffs to make such proof thereof as they may be advised.

V. And as to any other allegations in said complaint contained, not hereinbefore fully answered or admitted, defendant denies the same, and each thereof, and leaves the plaintiffs to make such proof thereof as they may be advised.

Wherefore defendant demands judgment; that the complaint be dismissed with costs.

STEWART L. WOODFORD,
United States Attorney; Attorney for Defendant.

13 SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Edwin A. Merritt, being duly sworn, says that he is the defendant above named, and that the foregoing answer is true to his own knowledge, except as to the matters therein stated to be alleged on

information and belief, and as to those matters he believes it to be true.

Sworn to before me, this — day of ——, 188–.

_____ _____,

Notary Public, New York County.

[Endorsed:] 7454. U. S. circuit court, southern district of New York. Charles C. Harrison *& al. vs.* Edwin A. Merritt, collector, etc. Answer. Stewart L. Woodford, United States attorney, attorney for defendant. Due service of a copy of the within answer is hereby admitted. New York, Jan'y 6th, 1882. Isaac Phillips, plaintiffs' attorney. To Isaac Phillips, plaintiffs' attorney.

14 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York, on the third day of June, in the year of our Lord one thousand eight hundred and eighty-five—

Present: The Honorable Hoyt H. Wheeler, sitting as circuit judge.

CHARLES C. HARRISON and *al. vs.* EDWIN A. MERRITT.

Now come the plaintiffs, by Henry E. Davies, Esq., their attorney, and move the trial of this cause. Likewise comes the defendant, by Sam'l B. Clarke, Esq., ass't U. S. attorney, his attorney. Thereupon a jury is empanelled and the cause proceeded to trial. After hearing the evidence of the parties and the argument of counsel the court directs the jury to find a verdict for the defendant. Thereupon the jury render a verdict, whereby they find for the defendant.

15 On motion of counsel for plaintiffs, the court ordered that the plaintiffs have a stay of all proceedings for twenty days within which to prepare and to serve a bill of exceptions.

A copy.

TIMOTHY GRIFFITH, *Clerk.*

Judgment. 1885.

16 United States Circuit Court, Southern District of New York.

CHARLES C. HARRISON and *al.*
vs.
EDWIN A. MERRITT. } 7454.

The issues in this action having been brought on for trial before Mr. Judge Wheeler and a jury, at a circuit court of the April term, 1885, and the issues having been tried, and a verdict for the defendant having been duly rendered on the third day of June, 1885, and his costs having been adjusted at $48.85:

Now, on motion of William Dorsheimer, United States attorney for defendant—

It is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $48.85, his taxed costs, and have execution therefor.

Judgment signed, this 27th day of July, 1885.

JOHN A. SHIELDS,
Deputy Clerk.

17 [Endorsed:] 7454. United States circuit court. Charles C. Harrison and *al. vs.* Edwin A. Merritt. Judgment roll. William Dorsheimer, United States attorney, for defendant. Filed ——1885. Costs, $48.85. 12.15 o'clock. U. S. circuit court. Filed June 27, 1885. Timothy Griffith, clerk.

18 United States Circuit Court, Southern District of New York.

CHARLES C. HARRISON, THEODORE A. HAVEMEYER, ALFRED C. HARRISON, WILLIAM W. HARRISON, and WILLIAM W. FRAZIER, Junior,
vs.
EDWIN A. MERRITT. } 7454.

This cause came on for trial at the April term, 1885, of the United States circuit court for the southern district of New York, on the 3rd day of June, 1885, before the Honorable Hoyt H. Wheeler, district judge, sitting as circuit judge, and a jury duly empanelled and sworn. The parties were represented by counsel. In the course of the said trial divers exceptions were taken by the counsel for the plaintiff- to the rulings of the court, which said several exceptions were then and there allowed by the court, and more fully appear in this bill of exceptions.

The defendant's counsel offered the usual stipulation, that if the plaintiffs are entitled to recover on the main question raised by the protest, the verdict should be for the plaintiffs generally, subject to adjustment at the custom-house as to formal requisites and
19 amount under the direction of the court, which offer was duly accepted by the plaintiffs' counsel, and it was so stipulated.

The plaintiffs' counsel then presented evidence tending to show the following facts:

That in the year 1881 the plaintiffs imported into the port of New York certain goods, wares, and merchandise, the invoices whereof were put in evidence by the plaintiffs' counsel, and which were as follows:

Invoice of 4,800 bags animal charcoal bought by order and fr. acc't of Messrs. Havemeyer, Harrison & Co., of Philadelphia, shipped, per St. "Persian Monarch," to New York.

HARRISON, HAVEMEYER & CO.

A. C. C. 4,800 bags wg. tons 300 @ 13 5 per ton..... £3,975

Charges:

Cablegrams	£20	5	2	
Consul's fee & petties		18	0	
B. lading		2	6	
Postage, &c.		6	9	
				20 12 5
				£3,995 12 5

E. & O. E. London, 23 April, 1881.

F. ENGLEHARDT & CO.

20 *Original Inv. No.* 574.

Facture a 470 sacs os calcines expedies par le soussigne par vapeur danois "Hermond" du Havre a New York pour compte at par ordre de Messieurs Drexel & Cie a New York.

Fee, $2½.
Am't of inv., f'cs 9,397.15.

HARRISON, HAVEMEYER & CO.

A¹ 236.	236 sacs pesant krs.....	20,236	
B¹ 234.	234 " " "	19,908	
	470 sacs.	Ks. 40,144 a fr. 24.625	par 100 ks.
		f. 9,885.45	
Mois fret suivant connoissement.....		501.80	
		f. 9,383.65	
Cout de la facture consulaire.....		" 13.50	
		F. 9,397.15	

Quatre cent soixante dis sacs os calcines valeur neuf mille trois cent quatre vingt dix sept francs quinze centimes.
Havre le 3 Juin, 1881.

GUST. ESBRAU.
P. ROUSSELL.

21 It is admitted by the counsel for the respective parties that the following is a correct translation of the foregoing invoice:

Original Inv. No. 574.

Invoice of 470 bags calcined bones shipped by the undersigned, by Danish steamer "Hermond," from Havre to New York, by order and for account of Messrs. Drexel & Co., New York.

Fee, $2½.
Amt. of inv., f'cs, 9,397.15.

HARRISON, HAVEMEYER & CO.

A[1] 236.	236 bags weighing, k'rs		20,236
B[1] 234.	234 " " "		19,908
	470 bags.	K'rs,	40,144

At f's 24.625 for 100 k's.

		f's 9,885.45
Less freight as per bill of lading		501.80
		f's 9,383.65
Consular fee		13.50
		f's 9,397.15

Four hundred and seventy bags calcined bones of the value of nine thousand three hundred and ninety-seven francs, fifteen centimes.

Havre, June 3, 1881.

GUST. ESBRAU.
P. ROUSSELL.

22 Invoice of 1,334 bags burnt bones shipped per "Persian Monarch" from London to New York for acc't of Messrs. Harrison, Havemeyer & Co., Philadelphia, and consigned to Messrs. Drexel & Co., New York. 80 tons cont., 26 April; 20 tons, 19 May.

HARRISON, HAVEMEYER & CO., *Phila.*

A. C. C.	80 tons burnt bones, @ £14 5 per ton	£1,140	
	20 do. do. £15	300	
		1,440	
	Consular fee		14 10
		£1,440	14 10
Less freight as per bill of lading—109 gr. 101 tons 4 cwt., 76 per ton, in full		3	5 19
		£1,404	15 10

London, 11 June, 1881.

P. ENGLEHARDT & CO.

23 That the collector of the port caused a duty of twenty-five per centum ad valorem to be assessed upon the said goods as "black of bone," to which assessment of duty the plaintiffs made the following protests:

NEW YORK, *July* 28, 1881.

To hon. collector of customs, New York.

SIR: We are dissatisfied with the decision and liquidation made by you on or about the 21st inst. on our consumption entry, No. 58105, ex "Persian Monarch," from London, arrived May 11th, 1881, and entered in your office on or about May 21, 1881, and we hereby give you notice of our objection and protest against the same.

The reasons therefor are that you have assessed a duty of 25 per centum ad valorem on A. C. C. 4,800 bags animal charcoal, which are in fact calcined bones contained in said entry, and which we claim are entitled to entry as such free of duty under section 2505 of the act of June 22, 1874 (Heyl., 1508). "Bones crude and not manufactured, burned, calcined, ground, or steamed." We pay the amount of duty you unlawfully exact, $4,994.75, in order to obtain or retain possession of our goods, and we shall hold you responsible for the same.

HARRISON, HAVEMEYER & CO.,
Per R. DE WARDENER, *Att'y.*

24 NEW YORK, *July* 28, 1885.

To hon. collector of customs, New York.

SIR: We are dissatisfied with the decision and liquidation made by you on or about the 21st inst. on our consumption entry (No. 69884), ex "Hermond," from Havre, arrived June 22, 1881, and entered in your office on the same day. And we hereby give you notice of our objection and protest against the same. The reasons therefor are that you have assessed a duty of 25 per centum ad valorem on A-B 470 bags of calcined bones, are entitled to free entry under section 2505, act of June 22d, 1874 (Heyl., 1508). "Bones crude and not manufactured, burned, calcined, ground, or steamed."

We pay the amount unlawfully exacted in order to obtain or retain possession of our goods, and we shall hold you responsible for the amount of duty exacted by you on the decision and liquidation aforesaid, being $469.

HARRISON, HAVEMEYER & CO.,
Per R. DE WARDENER, *Att'y.*

25 NEW YORK, *August* 2, 1881.

To hon. collector of customs, New York.

SIR: We are dissatisfied with the decision and liquidation made by you on or about the 25th day of July, 1881, on our consumption entry (No. 71492), ex "Persian Monarch," from London, arrived June 24, 1881, and entered in your office on or about June 27, 1881, and we hereby give you notice of our objection and protest against the same. The reasons therefor are that you have assessed a duty of 25 per centum ad valorem on A. C. C. 1334 bags of calcined bones contained in said entry, whereas we claim that calcined bones are entitled to free entry under section 2505 act of June 22d, 1874. (Heyl., 1508.) "Bones, crude and not manufactured, burned, calcined, or steamed."

We pay the amount unlawfully exacted in order to obtain or retain possession of our goods, and we shall hold you responsible for the amount of duty exacted by you on the decision and liquidation aforesaid, being $1,761.

HARRISON, HAVEMEYER & CO.,
Per R. DE WARDENER, *Att'y.*

That the plaintiffs paid the duty so assessed.

26 To further maintain the issues on the part of the plaintiff-plaintiffs' counsel called as a witness FRANK HENN, who, being duly sworn, testified as follows:

I reside in Philadelphia and am employed by Harrison & Havemeyer, the plaintiffs in this suit; have been in their employ about eight years. I remember the importations of animal charcoal and calcined bone made by them in the Persian Monarch and the Hermond in 1881. The sample of goods now shown me is sample of the animal charcoal we received in 1881 by the Persian Monarch and the Hermond. I took these samples myself from those importations, out of the very goods themselves. (Marked Exhibit 1.)

The plaintiffs' counsel then called as a witness ISAAC W. DRUMMOND, who, being duly sworn, testified as follows:

I am a chemist and have been for six years. I am a member of the firm of F. W. Devoe & Co., manufacturers of paints and so forth. I have frequently testified as an expert in the United States courts and other courts on questions of chemistry, and I am recognized as an expert in those courts.

The substance now shown me, Exhibit 1, is animal charcoal. It is produced from bones by taking the refuse bones from the slaughter-houses and other places, boiling the fat out of them, and put-

27 ting them afterwards into closed vessels, to exclude the air; then they are burnt in these vessels, calcined in these vessels, and after they are calcined they are ground to the consistency as you see it here, and it is then termed "animal charcoal," and is used for the purpose of decolorizing sugar by refiners and manufacturers of sugar.

The size in which it is broken is an element of its use in that regard; it has to be of a size sufficient for the sugar in liquid form of molasses to percolate through it. In manufacturing the thing, grinding the bones to this shape, as it is in this sample, there is a certain percentage of it which is very much finer than that, which cannot be used, and that is used by the manufacturers of paint for grinding into paint; but the percentage is about twenty to twenty-five, and the rest of it is used for sugar refiners. The fine powder cannot be used by sugar refiners, but is sold as a by-product for paint manufacturers.

Ivory drop black is the black obtained from burning ivory scraps, grinding them to an impalpable powder in water, and dropping it into suitable forms and drying it according to the sample now shown me, which is a sample of ivory drop black. It is used as a pigment, but for no other purpose that I am aware of.

Similar treatment of finer ground bone produces a black

28 paint that is sometimes called "ivory drop black." "Black" is a distinctive term and is a frequently used designation of paint and pigments. There are a great many blacks known to the color trade, perhaps fifteen or twenty of them. I have a list here that I have jotted down—twenty-one of them that I just thought of. There is almond black, China black, black lead, black gum, cork

black, ivory black, lamp black, etc., distinguished by the name and substance of which it is made.

The substance which I have before me in the sample of animal charcoal cannot be used as a pigment, because it is in a very coarse grain. We buy the powder of bone-black, which is the residue left from making this coarse grain. We buy it for twenty-five dollars a ton. The article now before me is worth, perhaps, eighty dollars a ton. We can buy all we wish of the same material as that, in a fine powder at twenty-five dollars a ton, and therefore we could not afford to buy this at an enhanced price. Chemically considered the two articles would be the same—this coarse powder and this coarse grain and the fine powder, but it would have the same relation that a piece of marble which might be valued at five thousand dollars for its size and it might not be worth one dollar if it is broken up into very small particles, though, chemically, they would be the same thing. And furthermore, it is material, where it is in such coarse grains, that it would need further grinding and
29 manipulation by us, which, of course, is expensive, in order to bring it down to the point of a powder where we could commence to use it as a pigment. Therefore I say it is not of service or of value to us as a pigment and is not a pigment.

I have brought some recognized authorities with me. This which I now produce is Watts' Chemical Dictionary and is considered a standard authority amongst chemists. It says, at page 624, under the caption "Bone-black," "a product obtained by heating bones to redness in inclosed vessels," and so forth.

Johnson's Encyclopedia is also considered an authority. I read from page 551, volume 1, of that work, under the head of "Bone-black":

"Bone-black or animal charcoal is the residue left on calcining bones in close vessels. On the application of heat destructive distillation takes place," etc.

The articles from which I read was written by Dr. Chandler, of the School of Mines of Columbia College.

I also read the definition of "bone-black" as given in Ure's Dictionary, at page 394:

"Bone-black, or animal charcoal as it is less correctly called, is the black carbonaceous substance into which bones are converted by calcination in close vessels."

30 I do not know in my line of business nor have I ever heard of an article known as "black of bone," neither in my business nor in the arts, nor in any commercial business.

And being cross-examined by defendant's counsel, the witness says:

In order to manufacture the article the first thing done with the bones is to boil them, as a matter of economy, to take off the fat; that is, to economize the fat, which is deleterious in the manufacture. After they are boiled they are placed in closed vessels to exclude the air and heated to redness, which drives off the volatile organic constituents, such as ammonical vapors, water, and several of the qualities of gases. It leaves all the inorganic matter, chiefly

phosphate of lime. It leaves carbon, which is organic and inorganic matter, which constitutes phosphate of lime; phosphate of lime to a percentage of about ninety and the remaining ten is carbon; fractional percentages of other matters, which are immaterial, exist.

Q. It does not change the form or shape of the bones as they entered the retorts, does it?

A. To answer that definitely, it would change the shape, but not in a general way. A bone can be put into a retort and as it comes out you can determine the size and shape of the bone as well as before it went in.

Q. Then I understand, in the manufacture of this sort of bone-black which is used for decolorizing sugars, the bones
31 as they were in the retort were taken out, and there is a special machine, is there not, for cracking it?

A. The bones after they leave the retort are put through two iron cylinders to break them up into smaller particles. There is no special machine made for that purpose that I know of. I am personally familiar with the manufacture of this article; I have seen it done a great many times. After being broken up, it is sieved so as to separate the large particles from the smaller.

I do not know what sizes are regarded as the minimum and maximum for decolorizing sugars; practically I should consider the sample now shown me as rather small for the sugar refiner's purpose. It must be as small as that, and the largest as large as the head of a pencil, I know it is used as large as the head of a pencil. I am not familiar with the decolorization of sugar to know. Practically, it runs from the size of wheat up to the size of the head of a pencil. I am familiar with Wagner's Technology. I do not consider it as much of an authority as Ure's Dictionary, or Watt's Dictionary. It is in good repute amongst students in schools, but I cannot say how chemists regard it. I have not seen it quoted or cited as an authority and I do not regard it as authority. I do not know that it is used as a text-book in schools. I graduated in 1878, at the School of Mines, Columbia College, and have been ever since
32 then with De Voe & Co., in the paint business as their chemist.

I am familiar with Wagner's Technology and Chemistry. I agree with what he says at page 553, under the head of "Animal Charcoal"—that "animal charcoal is the residue obtained by dry distillation of bone." Dry distillation is distillation as distinguished from wet distillation, which is the general form of distillation. Dry distillation is the placing of certain articles which will give off part of their substance under heat, in a retort, and by heating them certain gases will be given off and those are the distillates or products of the dry distillation. Animal charcoal is the residue.

Defendant's counsel quotes from Wagner's Dictionary and Cooley's Cyclopædia.

The bone-black which we buy for pigment purposes cannot be used as a pigment without further grinding by us. We have to grind it in oil to make a paint of it. It is ground in the medium we want to use it in, oil or varnish or water, or whatever we want to make of it.

And being examined in the redirect by plaintiff's counsel, says:

The sample now shown to me, Exhibit 2, is a sample of
33 the bones as they come from the retort before they are submitted to the grinding process.

This other sample, marked Exhibit 2, now shown to me is the way it is after it has been in the retort.

It still retains its shape, and you can see the saw marks on it. That piece of bone happens to have been sawn for some reason or other. It comes in that condition after being exposed to heat in the retort.

In all the various processes that have been described the bone is calcined while in the retort by the action of heat. Whether it is called distillation, or carbonization, or any other term, it is a calcination.

The sample now shown me, marked Exhibit 3, is raw bone before it has been calcined.

The samples now shown me, marked Exhibit 4, are bones that have been burned, calcined in the open air, so far as I can determine by looking at them.

They undergo that process to deprive them of carbon, and phosphate of lime is left. Phosphate of lime is white, and therefore those samples are white, and that is the shape any bone will take if they are burned or calcined with the action of air. If burned in closed vessels the carbon is not taken off by the air in the burning, and therefore the carbon remains with the bone, and is black because carbon is black—in most cases it is black.

As the substance comes from the retort after the calcination, of
which I have spoken, it is chemically changed from bone. It
34 is a different substance chemically as well as physically.

The bones as put into the retort come of all sizes; they are utterly irregular.

The plaintiffs' counsel then called as a witness for the plaintiff HAMILTON H. SALMON, who, being duly sworn, testified as follows:

I reside in Brooklyn, and do business in the city of New York as an importer, and have been an importing merchant about twelve or fourteen years. I know what the substance now shown to me is, Exhibit 1. It is burnt bone, calcined bone, what is called animal charcoal or bone-black. I have dealt in and imported that article for some time past, and am familiar with the names by which it is known in trade and commerce. By importers of that article it is called and recognized as "animal charcoal," sometimes "burnt bone," and sometimes merely "charcoal." It is designated by the names by which it is imported. In Germany it is called "Knochen Kohle," which is "burnt coal." In France it is "animal noir," which is "animal black." In this country it is mostly designated as "bone-black." It would be known as recognized in this country by the name of "bone-black," or as "animal charcoal." I never heard it called "black of bone." The term "black of bone" is not used as the designation of any imported article to my knowledge. The article is imported and used principally for refining purposes and

35 decolorizing liquors and sugars. I am familiar with the manufacture of it, and have seen it manufactured both in this country and abroad. The bones from which it is manufactured are generally cracked before they are put in the retorts, but sometimes they are put in whole. Some of the manufacturers in this country crack the bones before they put them into the retort. I know the manufacturers in St. Louis do, and I understand that the manufacturers in Brooklyn do it. Some six or eight that are in St. Louis all crack the bones to the required size before they are put into the retorts, and they are not cracked after they are burnt, for they come out complete, with the exception that they take some little dust out of them by sieving them.

The sample now shown is Exhibit 2, the same article of a larger size which is produced in the same way. It can be used for the purpose of sugar refining, but not many use it now in that way.

Prior to 1874 I know that this article was always imported free of duty, but in that year the Department began to impose duties upon it.

And being cross-examined by the defendant's counsel, he says:

I have known this article about fourteen years since 1872. I dealt in the article in 1872, 1873, and 1874. I did not import it, but I was cognizant of a large quantity that was imported
36 in 1873. Prior to June 22nd, 1874, that article was known in the trade and commerce of this country as "charcoal" or "bone black"—either "charcoal" or "animal charcoal"—sometimes "char" as an abbreviation. The usual name was "bone-black." That has been its usual name since I have been in business, except occasionally a man would say to me "have you any char" or "charcoal"?

My experience of foreign invoices in which this article is invoiced and classified as "bone" or "burnt bone" is since the 22nd of June, 1874.

The article is sometimes manufactured by cracking the bones before they are put into the retort. There are different kinds of retorts. I don't know whether you call it a retort or not. In St. Louis they bake bones in a kiln, and this kiln is made up of fire brick without any clay or iron whatever in the retort. It is merely a kiln, in other words, with about a dozen holes in it, in which they burn this article. It is not called a retort, but a kiln. Sometimes it is made in pots, and sometimes in upright retorts, and sometimes in horizontal,

In former years a large quantity of this largest size in the sample before me was used, but now very little of that size is used. It depends altogether upon the filters in the sugar refineries. Some use the large size, and some cannot use the large size. Formerly it was altogether different from now. Then they used a
37 larger size than they use now. In the manufacture the result aimed at is to get it to a certain size. When it is cracked before being put in the retorts, the size they crack it to, is just exactly the size they wanted it, and they put it in the retorts at that

size. When it has been made by cracking the bones before they are put in the retort or the kiln, they put it through a sieve merely to take out the dust.

The plaintiffs' counsel then called as a witness, on the part of the plaintiff, FREDERICK W. SIMMONDS, who, being duly sworn, testified as follows:

I reside in New York, and do business as an importing merchant there. I am familiar with the article of commerce shown in the sample, Exhibit 1, before me. I have dealt in it, imported, and sold it. I first imported it in 1881. The price was high here then and moderate on the other side, and I thought it could be imported to advantage. I went to the custom-house to inquire what the duty was, and they said——

The counsel for the defendant objected to this testimony on the ground that what was said at the custom-house to the witness is immaterial.

38 The court sustained the objection and excluded the evidence, to which decision the plaintiffs' counsel duly excepted, and prayed the court to seal this his bill of exceptions, which was done accordingly.

I know by what name the article shown me is known and recognized among importers and dealers. It is called "animal charcoal," "bone-black," "burnt bone," and "char." I never heard it called "black of bone," and I never heard that name as descriptive of any article of trade or commerce.

And being cross-examined by the defendant's counsel, he says:

I think I have heard that substance called "animal carbon." My experience in this article began in 1881; I had no practical knowledge of it between 1874 and 1881. I never dealt in it before 1881. The common name in this country is "bone-black" and "black," "bone-black" or "bone-coal," very often "bone-coal."

The plaintiffs' counsel then read from "Webster's Dictionary" the definitions of the words "burn," "burned," "calcined," and "bone-black."

39 The plaintiffs' counsel then rested his case.

The defendant's counsel then opened his case, and, to maintain the issues on the part of the defendant, called as a witness HENRY P. S. CHAMBERS, who, being duly sworn, testified as follows:

I am a commission merchant and dealer in bone-black, fertilizing materials, &c., and have been in that position for seventeen years. My firm was formerly Chambers Brothers; it is now Chambers Brothers & Co. We do business at No. 81 Pine street, in the city of New York. I am familiar with the article now shown me, and have known it during all the time that I have been in business. The trade name under which it has been dealt in, in the trade and commerce of this country, is generally "bone-black," or "animal charcoal," commonly called "black" in ordinary business. I have heard

the phrase "black of bone" applied to that article. That is not the common name, but simply the literal translation from the French, "*noir d'os.*" The article is never known in the trade and commerce of this country as burnt bone, calcined bone, or ground bone. I have been familiar with the article in the trade in this country which is described by the term "burnt bone." It is bones burnt in the open air. It generally comes from South America, where the bones are used for fuel. This sample now shown me, Exhibit 4, repre-
40 sents it. I am familiar with the article dealt in, in the trade of this country, called "calcined bone." It is the same as "bone-ash" or "burnt bone," excepting that there is a little more care exercised in the manufacture, which produces simply perfectly white dust like that (referring to sample). The incineration is more perfect, and the bone is reduced to a more impalpable condition. It is almost a powder. It is used to mix paint. That is the calcined bone of commerce. Ground bone is used for fertilizing purposes. Either the raw bone ground, or bone subjected to steam and rendered soft, and ground up. It is a raw or steamed bone ground up. It is what is known as "ground bone" in the trade, and used for fertilizing purposes. The bone dust is simply the final distribution of bone as ground bone, only more fine. Those are the trade terms.

My business is in this article, and all kinds of fertilizing materials—dried blood, fish scrap, sulphate of ammonia, bone raw and steamed, ground or unground, and bone-black in all its forms, both the new and the old. I mean, by the new, black used by sugar refiners, and the old, the same after it has gone through the process and is no longer of any use to them. They used the latter for a fertilizer.

The process to which the burnt bone and calcined bone that I have referred to are represented by the white samples before
41 me, and the effect of the process of heat to which they have been subjected, drives out the carbon. In the case of bone-black the carbon remains.

And being cross-examined by the plaintiffs' counsel, he says:

The difference between the calcined bone and burnt bone is that the calcined bone is made with more care than the burnt bone; that is the distinction in the trade. In my mind there is no difference—a burnt bone is a calcined bone, and they are synonymous. The black now shown me is not a calcined or burnt bone; it is charcoal. In my mind it is not a calcined bone; it has been burnt without exposure to the air. I say bone-black is neither calcined nor burnt bone. In my mind the word calcined means the thorough burning of bone in the open air. I differ from the scientific authors, whose works on that subject have been read here; I think I agree with the trade distinction, which is as far as my knowledge goes. The trade distinction of the word calcined bone is a bone burnt in the open air, and also of burnt bone; a bone cannot be practically burnt or calcined and the air excluded.

The white residuum is known in the trade as burnt or calcined

bone, and I dealt in that; we do not always advertise on our bills
the article we deal in; the paper now shown me is one of
42 our bills; we did not state in our bills that we were dealers
in the substance I call burnt or calcined bone; we simply included it under the head of fertilizing materials; some of the manufacturers of what I call burnt or calcined bone state on their bill-heads that they are manufacturers of calcined bone; I think I have seen it on their bill-heads, but I cannot give an instance now; I cannot give an instance of any one who does it; my best recollection is that Prestons have it on theirs, but I am not sure.

I know the firm of Lister Brothers; I do not know whether they make what I call calcined or burnt bone or not; they manufacture bone-black and fertilizing materials; by bone-black I mean this charcoal; the fertilizers they make for distribution throughout the Southern States for the raising of crops; they are made from bone or from Charleston rock and refuse coal-black; the black that I call bone-black they call either bone-black or animal charcoal, or something of that kind, on their bill-heads; they do not call it "black of bone"; I do not know of any manufacturer or dealer who puts upon bill-heads or advertisements the words "black of bone" as descriptive of bone-black; I think none of them do it.

I have never watched the process of making what I call calcined bone and burnt bone, but I know that calcined bone is made more
carefully than burnt bone from the statements of others to
43 me, and from the fact that it is generally sold at a much
higher price than the ordinary bone-ash or burnt bone; it is made here now, and has been made here for years, by Prestons and others connected in the trade; I instance Prestons because I have bought this stuff from them, and they have made it for a number of years; I never sold it in large quantities—only a few barrels at a time; they make it in small quantities and charge a high price for it; they call it on their bills when you buy it from them calcined bone.

This sample which is now before me, Exhibit 4, is known in the trade as bone-ash. If I ordered bone-ash I would expect to get that; "bone-ash" is the general name and designation of that in the trade without regard to the degree of fineness of which it is made, though it generally comes coarser than that sample.

This sample now shown me is not bone-ash. When I want this I do not say burnt bone; the term burnt bone is very seldom used. The trade term for this is generally "ash."

And being examined upon the redirect by the counsel for the defendant, he says:

The calcined bone, as I call it, where the article has been burnt more carefully is used for making crucibles.

I know what the difference in value is between bone-black, such as is represented in the tin, and the crude bone as it comes from the butcher's shop.

44 The defendant's counsel then offered to ask the witness the following question:

Q. What is the difference?

The plaintiffs' counsel objected to the admission of this evidence as immaterial, and the court overruled the objection and admitted the evidence; to which decision the plaintiffs' counsel duly excepted, and prayed the court to seal this his bill of exceptions, which was done accordingly.

A. The bone is worth about $22 a ton; the bone-black is worth $65.

The defendant's counsel then offered to ask the witness the following question:

Q. What is the difference in value commercially between the white article, the burnt bone or burnt ash or calcined bone, as the article usually dealt in, in the trade and the bone-black in the tin?

The plaintiffs' counsel objected to the admission of this evidence as immaterial, and the court overruled the objection and admitted the evidence; to which decision the plaintiffs' counsel duly excepted, and prayed the court to seal this his bill of exceptions, which was done accordingly.

45 A. About $40 a ton is the difference in value. The bone-ash was worth from $20 to $22, and the other $65. The ground bone of commerce varies from $25 to $30 a ton, and the bone-black is $65.

The defendant's counsel then offered to ask the witness the following question:

Q. What is the difference in value between bone-black before it is used by the sugar refiners and after it is spent for that purpose?

The plaintiffs' counsel objected to the admission of this evidence as immaterial, and the court overruled the objection and admitted the evidence; to which decision the plaintiffs' counsel duly excepted, and prayed the court to seal this his bill of exceptions, which was done accordingly.

A. Before it is used it is worth $65, and after they throw it out—discard it—it is worth $17 to-day.

The defendant's counsel then called as a witness on the part of the defendant, JOHN MULLER, who, being duly sworn, testified as follows:

I am a manufacturer of bone-black, and have been in that
46 business since 1874. I had not been in that business before 1874. My first experience of it was in that year.

We have special machinery for cracking the bones as they come from the retorts and kilns and for sieving it.

For the use of sugar refiners it must not be greater than a certain size, and not below a certain size. It is not salable for that purpose unless it comes within limits of size, and our machinery is adapted to bring about that result. I agree with Mr. Chambers as to the

difference in value between the bone-black now shown me and the crude bone.

We always crack the bones after they come from the retort; we never crack them before they are put into the retort. I know that that is the usual way they are done in this country.

After the bones come from the retort it costs at a rough estimate from $15 to $20 a ton to manufacture them into bone-black as it is exposed for sale; that is, the part of the manufacture subsequent to the burning.

The name of the article in the trade and commerce of this country is "bone-black" or "black." That is the usual customary name. It might be called "black of bone" to distinguish it from "black of ivory." There is a black made from ivory. I have heard it
47 called that way to make the difference between black of ivory and black of bone. Black of ivory is ground very fine to use for paint and black varnish. I have heard it called so, but that is not the usual name. The customary name is "black" or "bone-black," but I have heard it distinguished that way.

The article of bone, as it comes from the retort before the grinding, cracking, and sieving process, is not to my knowledge an article of commerce in this country. In that condition it is not an article of commerce.

It is my business to make myself familiar with all branches of my business. I know what in the trade, while I have been in business, is known by the phrase "burnt bone." It is bone-ash. It is like the sample now shown me, but sometimes finer. It is bone burnt in the open air, and is imported from South America. I have received cargoes of bone from South America, received, say, from twenty-five tons of bone-ash similar to this here. It is the same thing as that known in the trade as calcined bone. The difference between burt bone and burnt ash and calcined bone is that calcined bone is burnt admitting the air, and bone-black is burnt excluding the air. "Calcined bone," "burnt bone," and "bone-ash" are all one and the same thing.

I know ground bone, of course. That is not burnt, but
48 some times the bones are ground raw for fertilizing purposes. The ground bone of commerce is raw bones before they are burnt. Bone-dust is merely the dust that is sifted out of this bone black. It is only used for fertilizing.

And being cross-examined by the counsel for the plaintiffs, he says:

I am a manufacturer of "bone-black;" I am not a manufacturer of bone. The term black of bone is used to distinguish this finer ground article, which is suitable for paint—finely ground bone. Sometimes the bone-black is ground down to such a size—not burnt bone. You cannot use that for paint. By burnt bone I mean this white substance, which is burnt bone or calcined bone or bone-ash. "Bone-ash" is not the term used in the trade to designate that. If I wanted to buy it I would order "bone-ash" or "calcined bone," it would not make any difference which. I don't think I would

order "calcined bone." I would order "bone-ash." There is not, to my knowledge, a bone dust that is made from bones that have not been burnt. I am not familiar with that article. I know what bone-dust is. It is very fine stuff that is used for fertilizing purposes. That is what is called bone-dust and is sold under that name.

49 The name boneburner is not the term generally used to designate those employed in my business. I never heard the term used and applied to people doing my business. They might call me a "boneburner," but I do not call myself that. I do not burn bones; if I burnt bones they are good for nothing for me. They might call me that or they might call me something else.

The defendant's counsel then called as a witness on behalf of the defendant JOHN KEHOE, who, being duly sworn, testified as follows:

I represent the firm of Lister Brothers, who manufacture a great many things, and among the rest they manufacture this article of "bone-black," that is what they call it. They also manufacture bone-ash, ground bone, and bone-dust. I represent the firm here in New York and do their buying and selling. Their factory is at Newark.

I agree with what Mr. Chambers has said here as to the difference in value between bone-black, as it is in this sample now shown me, and bones as they come from the butchers. I have been in the business seventeen years, which would carry me back to 1867. I have known this article now shown me in all that time. Its trade name in this country during all that time has been "bone-black." That is what I have generally heard it called, but I have heard it called by other names. I have heard it called "animal char-

50 coal," "bone-black," and "bone char," "black of bone" and "black." Black is the general name. I understand that when called "black" that is merely the abbreviation of "bone-black." During the time I have been in business I never heard of any article which has been dealt in under the name of "burnt bone." "Bone-ash" is what I call burnt bone. "Burnt bone" is not the name, but "bone-ash," which is bones that have been burnt in the open air, and "calcined bone," which is the same thing.

I don't know any difference between calcined bone and burnt bone. They take a little more care to make calcined bone and sell it for certain purposes. Ground bone is raw bone ground for fertilizers. We call it ground bone and bone-dust. They are usually used as synonymous terms. I have never known in the trade the article now shown me under the name of burnt bone, calcined bone, or ground bone.

And being cross-examined by the plaintiffs' counsel, he says:

By bone-dust I mean bone ground without having been previously burnt or calcined; not necessarily ground to a powder, but ground for fertilizing, bone-dust or ground bone.

On the bill-heads of Lister Brothers we call this black stuff

51 "bone charcoal;" but I very seldom see our bill-heads. The paper now shown me is a bill-head of Lister Brothers, and

on that the substance is called "charcoal." "Charcoal" is intended for bone charcoal. It is this substance now before me. On our bill-heads we generally call it "bone charcoal." On this bill-head now shown to me it is called "bone charcoal." Perhaps that is an error in printing the other one. The bill now shown me is for so many bags of bone-black; that is, bone charcoal, and is the substance now shown me in this tin box, Exhibit 1. In these bills of Lister Brothers now shown me bone-ash means this article like the sample before me, Exhibit 4. The other sample now shown me we call "bone charcoal;" but it is not in a marketable condition, it has to be ground finer. That is only partially ground, partly manufactured. I could not sell it readily to-day.

There were times when it could be sold; it is not wanted now. Our house may have sold an article like this; I don't know, I don't remember. It could have been sold some years ago; but how many, I can't remember.

The defendant's counsel here rested his case.

The plaintiffs' counsel then recalled the witness HAMILTON H. SALMON on the part of the plaintiffs in rebuttal, who testified as follows:

52 The value at this time of this article, "bone-black," for the purpose of sugar refining is for some sizes, $40—some sizes sell at $50, some sizes sell at $52.10, and the very best at $60. There may be occasionally a particular size which is made of a kind, in a single instance, which may bring $65. But the general price now is from $40 to $45 and $50, and the very highest is $60. In 1881 it was about the same price as now, except that when those goods were imported they were rather higher than in 1881.

The plaintiffs' counsel then called HENRY A. SIMONDS, as a witness on the part of the plaintiffs in rebuttal, who, being duly sworn, testified as follows:

I am in business in this city, with my father's house, dealing and importing merchants. I heard the evidence given here by the witness, Mr. Keogh, with reference to the articles contained in this paper box, now shown to me. I recognize the articles; I have seen them before. I got them from Mr. Kehoe's office. They were given to me as very coarse bone-black. I did not go there originally to get that article, but while talking with Mr. Kehoe he mentioned to me that he had sold some of this stuff for shipment to France, and as I had been buying their goods from time to time I suggested taking a sample, which I sent over to the other side. He
53 gave me that as a sample of goods that he was prepared to sell and I took it for that purpose, and subsequently I got another one exactly like it. The sample now shown me is, I presume, the one I obtained then—it was just like it. The first sample I got in December, 1883, and the other one in June, 1884.

Counsel for both parties then rested

The plaintiffs' counsel then moved the court upon the evidence

in the case to direct the jury to find a verdict for the plaintiff-, which motion was denied by the court, and the plaintiffs' counsel duly excepted to the decision, which exception was duly noted and allowed by the court.

The defendant's counsel then moved the court upon the evidence in the case to direct the jury to find a verdict for the defendant, whereupon the court ruled as follows:

The question in this case is whether bone-black is included in the clause "bones crude and not manufactured, burned, calcined, ground, or steamed," in the free list of section 2504 of the Revised Statutes.

54 The evidence shows that it is made by subjecting bones after being steamed and cleaned to destructive distillation by heat in close vessels until all is expelled but the carbon, and then crushing that, and assorting the pieces into proper sizes for clarifying sugar.

Bones are understood to be calcined when they are subjected to heat in open vessels, so as to produce bone-ash by being made friable, and to be burned when subjected to the direct action of fire. This distillation appears to be different from either, and the crushing and assorting is an important part of the process.

By the whole a new article is made from bones. They are not treated thus for the purpose of securing them or making them portable, as grass is made into hay without becoming manufactured, as was held in Franzee *vs.* Moffit, 20 Blatchf., 267, or as apples are cut and dried, as in that case mentioned. The bones are manufactured into bone-black by processes of several steps. Schreifer *vs.* Wood, 5 Blatchf., C. C. Reports, 215. These steps amount to more than either of those allowed by the statute without making the result dutiable. For these reasons the jury are directed to find a verdict for the defendant.

To which decision and direction the counsel for the plaintiff duly excepted, which exception was duly noted and allowed by the court.

The jury thereupon, under the direction of the court, rendered a verdict for the defendant.

55 And because none of the exceptions so offered and made appear upon the records of the said trial, therefore, on the prayer of the plaintiffs, by their counsel, the judge has signed this bill of exceptions *nunc pro tunc* as of the third day of June, 1885.

HOYT H. WHEELER.

56 [Endorsed:] [In pencil:] Copy compared. 7454. United States circuit court, southern dist. of New York. Charles C. Harrison *et als. vs.* Edwin A. Merritt. Bill of exceptions. Isaac Phillips, plaintiffs' attorney. U. S. circuit court. Jul. 18, 1885. Timothy Griffith, clerk.

57 Supreme Court of the United States. Of October Term, in the year of our Lord one thousand eight hundred and eighty-five.

CHARLES C. HARRISON, THEODORE A. HAVEMEYER, ALFRED C. HARRISON, WILLIAM W. Harrison, and William W. Frazier, Junior, Plaintiffs in Error,

vs.

EDWIN A. MERRITT, Defendant in Error.

Afterwards, to wit, on the second Monday of October, in the same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said Charles C. Harrison, Theodore A. Havemeyer, Alfred C. Harrison, William W. Harrison, and William W. Frazier, Junior, plaintiffs in error, by Isaac Phillips, their attorney, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit, that
58 by the record aforesaid that the judgment aforesaid in the form aforesaid given was given for the said defendant in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendant.

And the said plaintiffs in error pray that the judgment aforesaid for the errors aforesaid, and other errors in the said record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that the said plaintiffs may be restored to all things which they have lost by occasion of the said judgment.

ISAAC PHILLIPS,
Attorney for Plaintiffs in Error.

Endorsed: U. S. Supreme Court. Charles C. Harrison, Theodore A. Havemeyer, Alfred C. Harrison, William W. Harrison, and
59 William W. Frazier, Junior, pl'ffs in error, *vs.* Edwin A. Merritt, def't in error. Assignment of error. Isaac Phillips, att'y for pl'ffs in error. Service of a copy of the within is hereby admitted, this 6th day of Aug., 1885. Wm. Dorsheimer, U. S. att'y. U. S. circuit court. Filed Aug. 6, 1885. Timothy Griffith, clerk.

60 *Joinder in Error.*

Supreme Court of the United States.

CHARLES C. HARRISON, THEODORE A. HAVEMEYER, ALFRED C. HARRISON, WILLIAM W. HARRISON, & WM. W. FRAZIER, Jr., Plaintiffs in Error,
against
EDWIN A. MERRITT, Defendants in Error. } 7454.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by Wm. Dorsheimer, his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the Justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all thing- affirmed, &c,

61 WILLIAM DORSHEIMER,
Attorney for Defendant in Error.

Endorsed: 7454. U. S. Supreme Court. Charles C. Harrison & *al.* plaintiffs in error, *versus* Edwin A. Merritt, defendant in error. Joinder in error. William Dorsheimer, United States attorney, attorney for defendant in error. Due service of a copy of the within is hereby admitted. New York, Aug. 6th, 1885. Isaac Phillips, attorney for plaintiffs in error. To Isaac Phillips, attorney for plaintiffs in error. U. S. circuit court. Filed Aug. 6th, 1885. Timothy Griffith, clerk.

62 *Bond for Damages and Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

CHARLES C. HARRISON, THEODORE A. HAVEMEYER, ALFRED C. HARRISON, WILLIAM W. HARRISON, Junior, and WILLIAM W. FRAZIER,
vs.
EDWIN A. MERRITT.

Know all men by these presents that we, James J. Thomson, of 309 West 35th street, N. Y. city, and Herman S. Phillips, of 36 West 12th street, N. Y. city, are held and firmly bound unto the above-named Edwin A. Merritt in the sum of two hundred and fifty dollars, to be paid to the said Edwin A. Merritt, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this fifth day of August, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas the above-named plaintiffs have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named plaintiffs shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

JAS. J. THOMSON. [L. S.]
HERMAN S. PHILLIPS. [L. S.]

Sealed and delivered and taken and acknowledged, this fifth day of August, 1885, before me—

[L. S.] CHAS. JAMES,
Notary Public, N. Y. Co.

63 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

James J. Thomson and Herman S. Phillips, both of New York city, each being duly sworn, severally depose and say: That he is a resident of the southern district of New York, and a freeholder therein; that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JAS. J. THOMSON.
HERMAN S. PHILLIPS.

Sworn to this fifth day of August, A. D. 1885, before me—
[L. S.] CHAS. JAMES,
Notary Public, N. Y. Co.

[Endorsed:] Vol. —, page —. U. S. circuit court. Charles C. Harrison *et al. vs.* Edwin A. Merritt. Bond for costs on writ of error. Isaac Phillips, att'y for plaintiffs in error. The within bond approved as to form and sufficiency of sureties. August 6, 1885. Addison Brown, U. S. circuit court. Filed Aug. 6, 1885. Timothy Griffith, clerk.

64 UNITED STATES OF AMERICA, ss:

To Edwin A. Merritt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and eighty-five, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Charles C. Harrison, Theodore A. Havemeyer, Alfred C. Harrison, William W. Harrison, and William W. Frazier, Junior, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated August 6th, 1885.

ADDISON BROWN.

65 [Endorsed:] U. S. Supreme Court. Charles C. Harrison, Theodore A. Havemeyer, Alfred C. Harrison, William W. Harrison, and William W. Frazier, Junior, plaintiffs in error, against Edwin A. Merritt, defendant in error. Citation. Service of a copy of the within is hereby admitted, this 6th day of August, 1885. Wm. Dorsheimer, U. S. att'y. [Stamped:] U. S. circuit court. Aug. 6, 1885. Timothy Griffith, clerk.

Endorsed on cover: S. New York., C. C. U. S. No. 913. Charles C. Harrison, Theodore A. Havemeyer, Alfred C. Harrison, William W. Harrison, and William W. Frazier, Jr., plaintiffs in error, *vs.* Edwin A. Merritt, collector of the port of New York. Filed August 10, 1885.

Supreme Court U. S.
FILED
NOV 16 1885
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 913.

CHARLES C. HARRISON, THEODORE A. HAVEMEYER, ALFRED C. HARRISON, WILLIAM W. HARRISON AND WILLIAM W. FRAZIER, JR.,

Plaintiffs in Error,

vs.

EDWIN A. MERRITT, COLLECTOR OF THE PORT OF NEW YORK,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

C. C. SUYDAM,
Attorney for Plaintiffs in Error.

HENRY E. DAVIES,
Of Counsel for Plaintiffs in Error.

THE EVENING POST JOB PRINTING OFFICE, 208 Broadway, N. Y.

Supreme Court of the United States.

CHARLES C. HARRISON, THEODORE A. HAVEMEYER, ALFRED C. HARRISON, WILLIAM W. HARRISON AND WILLIAM W. FRAZIER, JR.,
Plaintiffs in Error.

AGAINST

EDWIN A. MERRITT, COLLECTOR OF THE PORT OF NEW YORK.
Defendant in Error.

Brief for Plaintiffs in Error on case submitted.

STATEMENT.

This action is brought to recover from the defendant, Collector of the Port of New York, the sum of seven thousand two hundred and twenty-four $\frac{75}{100}$ dollars ($7,224.75), which, as charged in the declaration, was illegally assessed and collected as duties upon three several importations of merchandise brought into the port of New York by the plaintiffs in the year 18[illegible]1.

On the part of the plaintiffs it was claimed that at the time the importations were made the goods in question were free of duty under the Revised Statutes of the United States, which contained the tariff law then in force.

In the section of the statutes which enumerates the articles which may be imported free of duty, the following clause is found:

"Bones, crude and not manufactured; burned, calcined, "ground, or steamed.

"Bone dust and bone ash for manufacture of phos- "phates and fertilizers."

U. S. Rev. Stat., Ed. 1878, § 2505, p. 483.

Due protest against this exaction was made, and the formal proceedings required to permit the bringing of the action were taken, of which no question arises in the case at bar, and in such protest, as now, it is claimed that these importations were entitled to free entry under the clause cited.

The cause was brought to trial before the Circuit Court of the United States for the Southern District of New York, and after the evidence of the parties to the action had been presented, the learned Judge, before whom the trial was had, directed the jury to find a verdict for the defendant, and gave his reasons for such ruling in the opinion which appears in the record.

Record, p. 25, fol. 54.

From the judgment entered upon that verdict, this appeal is taken.

Errors Assigned.

1.

That the Court erred in admitting evidence of the value of bone black, the article in question, as compared with values of crude bones, or of other products obtained from bones.

Vide three exceptions, Record, p. 21, fols. 44 –46.

2.

That the Court erred in refusing to direct the jury to find a verdict for the plaintiff upon the evidence, as prayed for at the conclusion of the testimony.

Vide Exception, Record, p. 25, fol. 53.

3.

That the Court erred in directing the jury to find a verdict for the defendant upon the evidence at the conclusion of the testimony.

Vide Exception, Record, p. 25, fol. 54.

LAW AND FACT.

Law.

1.

It is claimed on the part of the plaintiffs in error that the goods in question, known in trade and commerce as BONE BLACK, and by accurate scientific designation as Animal Charcoal, are free of duty, and entitled to free entry under the Tariff Act in force at the time of importation.

"§ 2505. The importation of the following articles shall be exempt from duty. * * * * * * Bones, crude and not manufactured; *burned*, *calcined*, ground or steamed.

"Bone dust and bone ash for manufacture of phosphates and fertilizers."

U. S. Rev. St., Ed. 1878, p. 483.

2.

On the part of the defendant it was claimed that the goods in question were a manufacture of bone, and as such were dutiable under the following provision of the Revised Statutes:

"§ 2504. Schedule M. * * * Manufactures of *bones*, horn, ivory, or vegetable ivory, thirty-five per centum, *ad valorem*."

U. S. Rev. St., Ed. 1878, p. 474.

The opinion of the Court found on page 25 of the Record shows that this view was adopted in rendering the decision appealed from, and that the Court decided the question of fact raised, and held Bone Black to be "a manufacture of bones," and as such liable to duty.

3.

The goods imported were classified by the collector as "black of bone," and duty assessed upon them at the rate of twenty-five per centum *ad valorem*, in pursuance of the following clause of the Tariff Act:

"§ 2504. Schedule M. * * * Black of bone, or ivory drop black, twenty-five per centum *ad valorem*."
U. S. Rev. St., Ed. 1878, p. 473.

It is apparent, however, from the record of evidence and the opinion of the Court, that this clause of the statute was not urged or relied on by the defendant as justifying his action, or considered by the Court in reaching the decision made.

Facts.

From the evidence the following facts appeared:

The goods in question were received by the plaintiffs pursuant to three separate invoices, as follows:

The first from England under date of April 23, 1881, and headed:

"Invoice of 4,800 bags of animal charcoal * *"
Record, f. 19.

The second from France under date of June 3, 1881, and headed:

"Facture a 470 sacs os calcinés" * * *
(*Translated*): "Invoice of 470 bags calcined bones" * *
Record, ff. 20–21.

The third from England under date of June 11, 1881, and headed:

"Invoice of 1,334 bags of burnt bones" * * *
Record, f. 22.

The defendant collector caused a duty of twenty-five per centum *ad valorem* to be assessed upon the goods referred to in these three invoices, classifying them as "black of bone," on which the plaintiffs protested and

claimed the goods to be free of duty as "calcined bones," pursuant to § 2,505, U. S. Rev. St. cited.

Record, ff. 23–26.

The goods imported by the plaintiffs were identified as represented by the sample, Ex. 1.

Record, p. 13, f. 26.

The expert witness, Drummond, testifies to the following facts: That the substance represented by Exhibit 1 is animal charcoal obtained by cleaning refuse bones, placing them in closed vessels and calcining them, the resulting product is then ground to the size represented by the sample, and used by sugar refiners as a decolorizer. The size in which it is broken is an element of its use. A fine powder cannot be used by sugar refiners.

"Ivory drop black" is a pigment made by burning scraps of ivory, grinding them to an impalpable powder in water, dropping it into suitable forms, and drying it. It is used as a pigment.

A similar treatment of finely ground bone produces a black paint sometimes called "ivory drop black."

"Black" is a distinctive term among dealers in colors, and is frequently used as a designation of paints and pigments.

There are many *blacks* known in the color trade distinguished by the name of the substance from which they are produced.

The substance represented by Exhibit 1 cannot be used as a pigment; is not a pigment.

Witness has never known or heard of an article known as "black of bone" in business or in the arts.

Record, pp. 13–14, ff. 27–30.

In all the various processes that have been described the bone is calcined while in the retort by the action of heat. Whether it is called distillation or carbonization, it is a calcination.

The sample shown, Exhibit 4, is bone that has been burned or calcined in the open air; it undergoes that process to deprive it of carbon, and phosphate of lime is

left. If burned in close vessels, the carbon is not taken off by the air, and the resulting product is black in color.

As the substance in question in this action comes from the retort, it is chemically changed from bone. It is a different substance, chemically as well as physically.

Record, p. 16, ff. 33, 34.

The witness, Salmon, an importer familiar with the article, and a dealer in it, testifies:

That the substance is known here as "bone black" or "animal charcoal," and has been so known since 1874.

He never heard it called "black of bone," and that term is not used as the designation of any ~~important~~ imported article.

Record, p. 16, f. 34.

The witness, Simonds, an importer and dealer in this substance, testifies to the same effect.

Record, p. 18, f. 38.

The following descriptions of the article in question were read in evidence, taken from scientific works of recognized authority.

"Bone black, animal black, animal charcoal * * * a product obtained by heating bones to redness in close vessels. Large quantities of stinking gas, empyreumatic oil and volatile alkaloids are then evolved, and there remains a black mass, consisting of an intimate mixture of charcoal, containing nitrogen, with the mineral matter of the bone, chiefly phosphate and carbonate of calcium.

It possesses the power of abstracting many solid substances from their solutions, and is used on a very large scale as a decolorizing agent in the refining of sugar. * * *"

Watts' Chemical Dictionary, p. 624.
Record, p. 14, f. 29.

"BONE BLACK or animal charcoal is the residue left in calcining bones in close vessels. The bones are placed either in close retorts, like those used in making coal gas, or in iron pots. On the applica-

tion of heat, destructive distillation takes place. Combustible gases escape, accompanied by vapors, which condense to ammoniacal water and offensive oils. Bone or Dippel's oil is thus produced. The residue in the vessels amounts to about 50 per cent. in weight of the original bones. It is passed between rollers and separated by sieves into different sizes. * * * Its chief application in the arts is for the purification of sugar. * * *"

C. F. CHANDLER.

Johnson's Encyclopædia, vol. 1, p. 551.
Record, p, 14, f. 29.

"BONE BLACK, or animal charcoal, as it is less correctly called, is the black carbonaceous substance into which bones are converted by calcination in close vessels. * * *"

Ure's Dictionary of Arts, &c., p. 394.
Record, p. 14, f. 29.

Wagner's Technology and Cooley's Encyclopædia describe and define the word bone black, and the method of production in the same manner, with slight differences of phraseology.

Record, p. 15, f. 32.

On the trial of the action the following definitions in ordinary and accustomed language of the words used in the clause of the Tariff Law under discussion, and in the scientific descriptions of the substance bone black, were given, all from Webster's Dictionary, an acknowledged authority.

"BONE BLACK. The black carbonaceous substance into which bones are converted by calcination in close vessels, called also animal charcoal." * * *

"BURN, * * 3. To affect by or submit to the action of fire or heat, for some useful or economic purpose, or in the processes of the arts. As, to *burn* charcoal, or to *burn* a kiln of wood, to reduce wood to charcoal, to burn bricks to bake or harden them by fire. * * *"

"CALCINATION. 1. The operation of expelling from a substance by heat some volatile matter, and thus disintegrating it and reducing it to a friable state. Thus carbonate of lime is reduced to lime by calcination, or the expulsion of carbonic acid. * * *"

"CALCINE. 1. To reduce to a powder or to a friable state, by the action of heat, or to expel some volatile matter from, as carbonic acid from limestone."

Record, p. 18, f. 38.

For the defense three witnesses were called, whose evidence, when tested by cross-examination, corresponded with that given on behalf of the plaintiff in error.

The witness Chambers testifies, on the direct, that the article in question is generally known in trade or commerce as "bone black" or "animal charcoal," while he has heard the phrase "black of bone" applied to it; that is not the common name.

He identifies the sample shown as Exhibit 4, which, he says, are bones burned in the open air, and states he knows of articles dealt with in the trade called "burnt bone" and "calcined bone."

Record, pp. 18 19, ff. 39-41.

On his cross-examination he states, that to his mind there is no difference between a burnt and calcined bone; that bone black is not calcined bone. and that he differs from the scientific definitions that have been given in the evidence.

Though dealing in the article, he does not state in his bills that he is a dealer in burnt or calcined bone. He can give no instance of any dealer who does so state.

He does not know of any manufacturer or dealer in "bone black" who describes it on his bills as "black of bone."

He knows nothing of the process of making what he calls "calcined bone and burnt bone."

The sample, Exhibit 4, is known in trade as "bone ash." "Bone ash" is the general name and designation of that

in the trade, without regard to the degree of fineness of which it is made.

The term burnt bone is very seldom used. The trade term for this is generally "ash."

Record, pp. 19, 20, ff. 41–44.

The witness then, under objection and exception duly taken, gave evidence as to the comparative values of "bone black" and "crude bone," "bone ash," and "spent bone black."

Record, p. 21, ff. 44, 45.

The witness Muller testified: That the name of the article in question in trade or commerce is "bone black" or "black." He has heard it called black of bone to distinguish it from black of ivory; that is not the usual name.

The article made by burning bones in the open air, which he says is known in trade as burnt bones or calcined bones, is "bone ash."

On CROSS-EXAMINATION he states:

That he is a manufacturer of "bone black," not a manufacturer of "bone." The term "black of bone" is used to distinguish the finely ground article which is suitable for paint. If he wished to buy the article he speaks of as "burned bones" or "calcined bones," he would order "bone ash."

Record, p. 22, ff. 47, 48.

The witness Kehoe testifies: That the article in question has been known in this country since 1867, by the trade name "bone black."

Has never heard of any article dealt in under the name of "burnt bone." "Bone ash" is what he calls "burnt bone," which is bones that have been burnt in the open air, and "calcined bone," which is the same thing. He knows no difference between calcined bone and burnt bone.

Record, p. 23, f. 50.

On his CROSS-EXAMINATION he states: On the bill-heads of our house we generally call the substance in question

in this case "bone charcoal." This bill of our house shown, is for "bone black," which is the article represented by Exhibit 1. In these bills of our house shown, the term "bone ash" means the article represented by Exhibit 4.

POINTS.

I.

It was manifest error for the Court to admit and consider the evidence given on the trial as to the value of the article imported, as compared with that of the crude substance, from which it was produced, with the value of another product obtained from the same crude substance by a different process; and with the value of the article itself after it had been used for the purpose for which it was intended.

Record, p. 21, ff. 44, 45.

(*a.*

The question to be tried was simply whether or not the article imported by the plaintiff in error was or was not included in the clause of the Tariff act which exempts from duty "bones crude, or unmanufactured, burned, calcined, ground, or steamed," and upon that issue no possible question of actual or comparative value could arise.

II.

The Court erred in refusing, as asked, to direct the jury to find a verdict for the plaintiffs upon the conclusion of the evidence.

1.

The evidence showed beyond dispute (see abstract of testimony, *supra*) that the trade name or designation of the article imported by the plaintiffs, and shown in Ex. 1, was "Bone Black."

2.

That it was in fact and of necessity, through the method of production, *calcined bone*, and that term, in common and ordinary language and according to scientific definition, aptly and correctly described the substance.

3.

That the Tariff Act contained in the Revised Statutes of the U. S., ed. 1878, nowhere mentions or provides for "Bone Black," either *eo nomine* or by any other of the trade or technical terms by which it is known, such as "animal charcoal," "animal carbon," "char," but does provide that "calcined bones" shall be free of duty.

4.

That the substance represented by Ex. 4, a product resulting from burning bones in the open air, is not known or recognized in trade or commerce as "calcined bone," but the witnesses for both parties agree in saying that the trade term and designation of this article is "Bone Ash," and under that name we find it mentioned and provided for in the Tariff Act cited, in the clause immediately following that providing for "calcined bones," thus showing conclusively that this substance, "Bone Ash," was regarded and considered, in the intention of Congress, as an article of merchandize produced from bone, separate and distinct from any of those provided for in the preceding clause.

5.

There was no evidence whatever to show that the article of the plaintiffs importation could be classified under the clause of § 2504, reading "Black of bone, or ivory-drop black."

Plaintiffs' expert witness, Drummond, testifies that neither in business nor in the arts has he heard of an article know as "black of bone." That "ivorydrop black" is a pigment produced by a peculiar process, and that by similar treatment of this substanee a black pigment can be produced that is also called "ivory-drop black." That bone black, in the condition in which it is imported and as exhibited on the trial, is not adapted for and cannot be used as a pigment.

That in the business in which he is engaged (manufacture of paints) a number of black pigments are known and used, which are distinguished, one from the other, by the name of the substance from which they are produced.

Record, pp. 13, 14; ff. 27–30.)

This evidence, together with the wording and connection, shows that Congress, in the use of the phrase "black of bone," with the alternative "ivory-dop black," intended to cover the black pigment produced from bone as well as that resulting from similar treatment of ivory.

This view is corroborated by the evidence of the witness Muller, a manufacturer called for the defence. He says, on his direct examination,

(Record, p. 22, fol. 47):

"* * * It might be called 'black of bone' to distinguish it from 'black of ivory;' there is a black made from ivory; I have heard it called that way to make the difference between black of ivory and black of bone. * * *"

On cross-examination he says,

Record, p. 22, f. 48:

"* * * The term 'black of bone' is used to distinguish this finer ground article, which is suitable for paint. * * *"

The other witnesses for the defense, Chambers and Kehoe, say that the usual and customary name of the substance imported by the plaintiff is "bone black."

They say that they have heard the phrase "black of

bone" applied to it, but admit that is not a common name or one in use for it.

Record, p. 19, ff. 39, 42; p. 23, ff. 50, 51.

6.

If this refusal to direct a verdict for the plaintiffs was based upon the ground that the article in question was either a "manufactured article not otherwise provided for," or a "manufacture of bone," as may be gathered from the opinion of the Court, it is submitted that even greater error exists than is shown in the previous points.

(*a.*)

That this article cannot be classed as a "manufacture not otherwise provided for" needs no argument.

The language of the clause of the statute in question, "Bones crude, and not manufactured; burned, calcined, ground, or steamed," shows that Congress, after providing for "bones unmanufactured," had also in view and under consideration bones that had been subjected to the processes of burning, calcining, grinding or steaming, and that if bones which have been treated in this manner can in any sense be said to be manufactured, they are in this clause described and provided for as distinguished from bones unmanufactured.

(*b.*)

This substance, "bone black," which is defined as "the black carbonaceous substance into which bones are converted by calcination in close vessels," can by no possibility be regarded either in fact or law as a "manufacture of bone."

1.

This position is conclusively established by the case of Meyer *vs.* Arthur, 91 U. S. Rep., 570.

In that case an attempt was made to classify "as manufactures of metals," white lead, and similar substances produced from the metals zinc or lead, by a treatment that includes, *firstly*, exposure to acids or heat, in such

manner as to cause a chemical change in the original metals, and *secondly*, a grinding of the product thus obtained.

This Court refused to sustain the proposition, and in the opinion delivered, says:

"Manufactures of metals refers to manufactured articles in which metal forms a component part, and not to articles in which it has lost its form entirely and become the ingredient of new forms."

With a substitution of the word "bones" for "metals" the ruling covers the case now before the Court.

Such a treatment, the Court says, is "not a *manufacture* but a *process*."

As to the effect upon classification of imported goods, resulting from the processes of burning, grinding, exposure to heat, &c., see

Arthur *vs.* Herold, 100 U. S. Rep., 75.
Frazee *vs.* Moffitt, 20 Blatchford, 267.

2.

The defendant produces one case to support the position that "bone black" should be called a "manufacture of bone" in the construction of the Tariff Laws, viz., Schriefer *vs.* Wood, 5 Blatchford, U. S. Rep., 215, decided in May, 1864, in the District Court of the United States, and upon this decision the opinion of the Court in the case at bar is evidently based.

That case arose under the Internal Revenue Laws now repealed, and was decided at a time when public necessity demanded, and too often obtained, a strict construction of such statutes.

Examination of the case as reported, will show that it was argued and decided with little thought or consideration, and if ever authority, has been overruled by the decision in Meyer *vs.* Arthur (*supra*).

A further suggestion is made, to show that at no time could that case have had authority as controlling laws relating to customs revenue, but that it was absolutely contrary to the spirit and letter of the statutes in forc

when the decision was given, for at that time not only was "bone black" free of duty, but it was distinguished in the Tariff Laws from "manufactures of bone" which were subject to duty.

Reference is made to the following citations from the statutes then in force:

"§ 22. From and after the day and year aforesaid there shall be levied, collected and paid a duty of thirty per centum on the importation of the articles hereinafter mentioned and embraced in this section; that is to say, * * *

Manufactures of bone, shell, horn, ivory or vegetable ivory." * * * * *

Act of March 2, 1861 (U. S. Stat., vol. 12, p. 192.)

"§ 23. From and after the day and year aforesaid the importation of the articles hereinafter mentioned and embraced in this section shall be exempt from duty * * * animal carbon (bone black). * * *"

Act of March 2, 1861, U. S. Stat., vol. 12, p. 193.

"§ 13. From and after the day and year aforesaid, in addition to the duties heretofore imposed by law on the articles hereinafter mentioned, there shall be levied, collected and paid on the goods, wares and merchandise enumerated and provided for in this section, imported from foreign countries, a duty of five per centum *ad vurlorem;* that is to say, * * *

Manufactures of bone, shell, horn, or vegetable ivory. * * *"

Act of July 14, 1862, U. S. Stat., vol. 12, p. 557.

This was the law in force when the case of Schriefer *vs.* Wood (*supra*) was argued and decided, but it seems to have been disregarded or overlooked by counsel and by the Court.

(*c.*)

If further argument is needed on the question of the intent with which Congress used the term "manufactures of bones" in the Tariff Act under consideration, it will be found in other clauses of that act, and especially in Schedule M, where Congress has enumerated and imposed duty upon various articles made from bone, and which are properly "manufactures of bones" in the sense in which that phrase has been interpreted by this Court in the case of Meyer *vs.* Arthur (*supra*).

> Schedule M, U. S. Rev. St., Ed., 1878, p. 474, provides for "buttons," "combs," "ivory, or bone dice," "draughts," "chess men," "chess balls," "bagatelle balls," all familiar well known articles made by process of the arts from bone, and of which bone as such is a component, unchanged chemically or physically, but by the art or skill of the manufacturer given such shape as to adapt it to the uses for which it may be designed.

(*d.*)

It is a well settled rule, that in the construction of a Tariff Act a Court may refer to past as well as subsequent statutes for the purpose of determining the intention of Congress in framing the law under consideration.

Lawrence *vs.* Allen, 7 How. U. S. R., 785.

On the part of the plaintiffs in error it is submitted that an examination of the laws relating to this substance "bone black" (animal carbon, calcined bones), shows that Congress intended it to be, and that it was free of duty from 1861 until March 3, 1883, when the Tariff Act now in force was passed and the article was subjected to duty.

As shown above under § 23 of the Act of March 2, 1861 (*supra*), "animal carbon (bone black)" was exempted from duty, and in the same section, "bones burnt and bone dust" are also declared free of duty. No mention of calcined bones is made in that act.

No subsequent mention is made in the statutes of "ani-

mal carbon (bone black)," nor is there any repeal actual or implied of the clauses cited down to the time of the Revised Statutes, and it must therefore be held to have been free of duty until that period.

Reiche *vs.* Smythe, 13 Wall., 162.
Smythe vs. Fiske, 23 Wall., 374.
Arthur *vs.* Lahey, 96 U. S., 112.

By the Revised Statutes, previous laws, tariff as well as others, were repealed, and we then find that while "animal carbon (bone black)," is not specifically named, a broad and sweeping clause is enacted covering all processes or treatments to which bones can be subjected, other than manufactures of bone for purposes of use or ornament, or the production of pigment.

"Bones crude, and not manufactured, burned, calcined, ground, or steamed.

Bone dust and bone ash for manufacture of phosphates and fertilizers."

U. S. Rev. St., Ed. 1878, p. 483.

This certainly must include bones calcined, the article known in trade, commerce and the arts as "bone black," or by the various other terms that have been cited.

Further and conclusive evidence of the fact that this substance was intended to be and was regarded by Congress as exempt from duty under the Revised Statutes, is found in the terms of the subsequent act by which a duty was finally imposed upon this substance.

The Tariff Act of March, 1883, contains the following two provisions referring to this substance by specific names, showing that the question had received more than ordinary consideration, and a determination to effectually remove it from the general clause under which it had theretofore been exempt from duty:

"§ 2,502. There shall be levied, collected and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty

which are by the schedules respectively prescribed, namely:

Schedule A. * * * The pigment known as bone black and ivory drop black, and bone char, twenty-five (25) per cent. *ad valorem*. * * *"

§ 2503. The following articles, when imported, shall be exempt from duty: * * *

Carbon animal fit for fertilizing only (free). * * *"

Act of March, 1883, U. S. Stat., vol. 22, pp. 494, 515.

As shown by the evidence, "bone char," "bone charcoal," "char," are names under which "bone black" is known, and are descriptive terms applied to that substance by importers and dealers.

Salmon, Record, p. 16, ff. 34, 36.
Simonds, " " 18, f. 38.
Kehoe, " pp. 23, 24, ff. 50, 51.

Could there possibly be a fuller recognition of the fact that animal carbon, bone black, or bone char, had been up to that time free from duty, and it was the intention of Congress that thereafter this substance, except so much thereof as was only fitted for use as a fertilizer, should be subject to payment of import dues.

It is further to be noted that in the Act of 1883 (*supra*), as well as in previous acts, "bone black," "animal carbon," "bone char," are specifically and by name provided for and distinguished from "manufactures of bone," which are provided for as follows:

"§ 2502. * * Schedule M. Sundries * * * * Bone, horn, ivory or vegetable ivory, all manufactures of, not specially enumerated or provided for in this act, thirty (30) per centum *ad valorem*."

Act of March 3, 1883.
U. S. Stat., vol. 22, p. 511.

III.

The Court erred in refusing to permit the case to go the jury and in directing a verdict for the defendant.

It was conceded that the tariff law, as given in the Revised Statutes, did not mention or refer to the article imported by the plaintiffs by a trade name or specific designation, and the plaintiffs claimed that it was covered by the phrase, used in the act, "calcined bones."

The defendants claimed that it was covered by the one or other of these expressions used in the act, "black of bone" or "manufactures of bone," and the Court decided the case by holding the goods to be dutiable as "manufactures of bone."

It is apparent that the expressions used in the Tariff Act, which were claimed by either party to the action to refer to this article, were *descriptive* and not denominative, and the question to be determined upon the evidence was the intention of Congress in using the terms referred to and the meaning they should bear.

This was entirely a question for the jury, and the Court had no right or power to decide it as a question of law.

Lawrence *vs.* Allen, 7 How., U. S. R., 785.
Frazee *vs.* Moffitt, 20 Blatch., 267.
Arthur *vs.* Herold, 100 U. S., 75.

IV.

As has been said in the last point, the various ~~to~~ terms used or claimed to have been used in the Tariff Act under consideration as designating the article imported by the plaintiffs are *descriptive*, and not *denominative*.

It is apparent from the evidence that neither "calcined bones," "black of bone" or "manufactures of bone" are trade or commercial names or designations of articles dealt in. The commercial or trade denominative names

of the goods in question have been shown to be "bone black," "animal charcoal or carbon," "char," "bone charcoal."

The witnesses for the defendant attempted to testify that "calcined bone" was a trade name for the bone burnt in the open air, represented by Exhibit 4, but were compelled to admit that the actual trade name and designation of that substance was "bone ash," the name by which it is recognized and provided for in the Tariff Act now considered.

Record, p. 20, f. 43; p. 22, ff. 47, 48; p. 23, f. 50.

It thus appears that none of the commercial or technical terms used in the Tariff Act contained in the Revised Statutes apply to, or describe, the article imported by the plaintiffs in error, but that article and the process by which it is produced, is fully described by the term "calcined bones."

The popular or received import of words furnishes the general rule for the interpretation of public laws, as well as of private and social transactions.

Maillard *vs.* Lawrence, 16 How. U. S. R., 251.

The language of tariff acts is construed as having the same meaning in commerce, that it has in the community at large, unless the contrary is shown.

Schneider *vs.* Barney, 113 U. S., 645.
Greenleaf *vs.* Goodrich, 101 U. S., 278.
Swan *vs.* Arthur, 103 U. S., 597.

V.

The Court in passing upon a question of this character should endeavor to give effect to the *whole statute*, as it stands, so as to make all the parts harmonize, if practicable, and give a sensible and intelligent effect to each, nor should it be presumed that the Legislature meant that

any part of a statute should be without meaning or without force and effect.

Ogden *vs.* Strong, 2 Paine, 584.
U. S. *vs.* Warner, 4 McLean, 463.
U. S. *vs.* Barrett, 2 Story, 389.
U. S. *vs.* Kirby, 7 Wall., 482.

In reading the clause of the statute relied on by the plaintiff in error, it will be found that the plaintiff's goods are provided for under the term "calcined bones," which they are in word and in fact, and should this Court refuse so to hold, it must be assumed that this phrase was used without meaning or serious intent, and was idle and superfluous.

This conclusion, as above shown, would be in violation of all accepted rules of statutory construction, and should be avoided, if possible.

The phrase "calcined bones" cannot mean the bone burnt in the open air, producing a white ash, composed chiefly of phosphates, for that, as we have seen, has a distinct and well known trade name, "bone ash," under which it is described and recognized in the Tariff Act.

U. S. Rev. St., Ed. 1878, § 2505, p. 483.

VI.

The law should be interpreted in its clear and apparent significance according to the usual and accepted meaning of the words used, in the absence of scientific or technical terms, and in case of existing doubt as to the meaning of the words employed the statute should be construed favorably to the importer.

(*a.*)

"The words of the statute are to be taken in the sense in which they will be understood by that public in which they are to take effect. Science and skill are not required

in their interpretation, except where scientific or technical terms are used * * * .

4. If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because in the language of Pollock, C. B., in Girr vs. Scudds, a tax cannot be imposed without clear and express words for that purpose."

U. S. *v.* Isham, 17 Wallace, 496 and cases there cited.

(*b.*)

Duties are never imposed upon a citizen in cases of serious ambiguity in the language of an act, a doubtful classification of articles, or vague and doubtful interpretation, and in all such cases the construction should be in favor of the importer.

Powers *vs.* Barney, 5 Blatchford, 202.
U. S. *vs.* Ullman, 4 Benedict, 547.

VII.

The judgment appealed from should be reversed, and judgment ordered for the plaintiff.

HENRY E. DAVIES,
Of Counsel for Plffs. in Error.

CHARLES C. SUYDAM,
Att'y for Plffs. in Error.

NOV 11 1885
JAMES H. McKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

CHARLES C. HARRISON, THEODORE A. Havemeyer, Alfred C. Harrison, William W. Harrison, and William W. Frazier, jr., plaintiffs in error,
vs.
EDWIN A. MERRITT, COLLECTOR OF the port of New York, defendant in error.

No. 913.

BRIEF FOR DEFENDANT IN ERROR.

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} No. 913.

BRIEF FOR DEFENDANT IN ERROR.

The plaintiffs in error brought this action in the circuit court of the United States for the southern district of New York to recover $7,224.75 duties on importations of merchandise from London and Havre, which amounts they allege were illegally assessed and collected. The amounts were paid by them under protest.

In their complaint, and in their bill of particulars, plaintiffs describe the merchandise as "bones burned, calcined, ground, or steamed" (record, p. 4).

In this description they have literally adopted the language of section 2505, U. S. Revised Statutes, edition of 1878, p. 483.

The defendant, in his answer, says the amounts collected from the plaintiffs were the amounts due from them to the United States, according to the rate of duty imposed by law upon such imported merchandise, and not otherwise (record, p. 7).

Upon the trial the plaintiffs reserved certain exceptions to the rulings and proceedings of the court, and error is assigned thereon in this court (record, pp. 9 and 26).

The errors assigned by plaintiffs will be taken up seriatim.

I.

> That the court erred in admitting evidence of the value of bone-black, the articles in question, as compared with values of crude bones, or of other products of bones. (*vide* three exceptions, record, p. 21).

The witness Chambers stated that he knew the difference in value between bone-black and the crude bone. The court permitted the witness to state the difference, over the objection of plaintiffs' counsel. Chambers answered that "bone is worth about $22 a ton; the bone-black is worth $65."

The defendant's counsel then asked, by permission of the court, over like objection of plaintiffs' counsel:

> Q. What is the difference in value commercially between the white article, the burnt bone, or burnt ash or calcined bone, as the article usually dealt in, in the trade, and the bone-black in the tin?
>
> A. About $40 a ton is the difference in value. The bone ash was worth from $20 to $22 and the other $65. The ground bone of commerce varies from $25 to $30 a ton, and the bone-black is $65.

The defendant's counsel then asked the witness, over like objection of the plaintiffs' counsel, by permission of the court, the difference in value between bone-black before it is used by the sugar refiners and after it is spent for that purpose.

A. Before it is used it is worth $65, and after they throw it out—discard it—it is worth $17 to-day.

The first assignment of error is made on the admission of the above evidence over the objections of plaintiffs' counsel.

The evidence was material and competent to show that the article imported was not, and could not have been, by reason of its value, "bones, crude and not manufactured; *burned*, *calcined*, ground or steamed," and exempt from duty under section 2505 of Revised Statutes of 1878. It shows the imported article to have been a manufactured article, not within the above exemptions, and which, by reason of such manufacture, enters into commerce with another name, and an entirely different value. No doubt the court admitted the evidence for this purpose, and for none other. It had its weight in fixing the character of the article imported, and it was a proper way by which to establish such fact.

II.

That the court erred in refusing to direct the jury to find a verdict for the plaintiffs upon the evidence, as prayed for at the conclusion of the testimony (*vide* exception, record, p. 25).

The evidence shows the name or designation of the article imported to have been somewhat unsettled by the

trade. All agree that it was used for the purpose of decolorizing sugar. It is also established by the evidence that after the bones from which it was made were taken from the retorts they were manufactured by machinery into a certain size for a certain purpose.

Mr. Drummond says it is animal charcoal (record, p. 13). Has never heard of black of bone (*id.* p. 14).

Mr. Salmon says it is burnt bone, calcined bone, what is called animal charcoal, or bone-black. Never heard it called black of bone (record, p. 16).

Mr. Simonds says the article is called "animal charcoal," "bone-black," "burnt bone" and "char." Has heard it called "animal carbon" and very often "bone coal" (record, p. 18).

Mr. Chambers testifies for the defendant that he is familiar with the article. It is generally called in commerce "bone-black" or "animal charcoal," commonly called "black." Has heard "black of bone" applied to it, which is a literal translation from the French. The article is never known in commerce as "burnt bone," "calcined bone," or "ground bone."

The trade distinction of the word calcined bone is a bone burnt in the open air, and also of burnt bone; a bone cannot be practically burnt or calcined and the air excluded (record, pp. 18, 19).

Mr. Muller testifies for defendant that the name of the article in the trade is "bone-black" or "black." It might be called "black of bone" to distinguish it from "black of ivory" (record, p. 22).

From the above abstract of testimony it is clear that

the name of the article imported by the plaintiffs was in dispute. The collector was, in the midst of such diversity of opinion as to its name, justifiable in assessing and collecting duty on said article as "black of bone," under section 2504, U. S. Rev. Stat., ed. 1878, p. 473.

This is not regarded as an absolutely material point, however, in the presentation of this case, for the imported articles are unmistakably dutiable under section 2504, U. S. Rev. Stat., ed. 1878, p. 474.

The plaintiffs received the benefit of the payment of a less ad valorem per centum by the action of the collector than is actually provided for by law under section 2504 Revised Statutes, 1878, and should not be permitted to complain of the same.

The merchandise imported by plaintiffs did not consist of crude bones; nor of bones burned ground, calcined, or steamed *only*. It had been by manfacture carried beyond any of these designations, was used for a different specific purpose, had by reason thereof greater value, and cannot by the facts be found such an article as is designated by any of these names.

Whatever may have been the name of the article imported (and it appears from the evidence that it may have been called by any of a half dozen), it is established beyond question that it was a *manufacture of bones*.

The witnesses all agree that after it is taken from the retorts it is manufactured into a certain size and shape, by machinery, and made an article of traffic, and sold for the special purpose of decolorizing sugars (record, pp. 15, 17, 22).

The statute in fixing duties on articles provides:

> SEC. 2504. Schedule M * * * "manufactures of bones, horn, ivory, or vegetable ivory, thirty-five per centum ad valorem."
>
> * * * Black of bone, or ivory, drop black, twenty-five per centum ad valorem. (U. S. Rev. Stat., ed. 1878, pp. 473, 474.)

Then follow the exemptions:

> SEC. 2505. The importation of the following articles shall be exempt from duty: * * * Bones, crude and not manufactured; burned, calcined, ground, or steamed." Bone dust and bone ash for manufacture of phosphates and fertilizers." (U. S. Rev. Stat., ed. 1878, p. 483.)

The plaintiffs' imported merchandise must come within one of these exemptions to be free of duty. They claim it was calcined bone. (Plaintiffs' brief, item 2, p. 11.)

It is plain from the evidence that the importation was not within either of the exemptions. It is another article manufactured from bone, requiring more steps in its process of manufacture, and having a distinct designation and use. If Congress had intended to exempt it from duty it would have included it with such exemptions by its name, signifying its use, as is done in the instances of bone ash and bone dust. It is clearly not calcined bone according to the definitions in plaintiffs' brief at page 8. Its manufacture did not stop at reducing it to a friable state by the action of heat, but other process of manufacture was resorted to in order to make it marketable merchandise for the distinct purpose for which it was to be used. Machinery was used for this purpose and not heat.

For a thorough and exhaustive review, including a final

decision, of a question identical with the one under consideration, reference is had to the case of Schriefer *vs.* Wood, 5 Blatchford's Circuit Court Reports, p. 215.

The article imported was not the result of chemical action solely, therefore was not a *process.* It was manufactured by machinery.

For definition of "manufacture," and other points bearing strongly in favor of defendant in this case *vide* Schreifer *vs.* Wood, 5 Blatch. C. C. Rep., p. 215.

The plaintiffs refer with confidence to the case of Meyer *vs.* Arthur, 91 U. S. Rep., 520, and say that if Schreifer *vs.* Wood (*supra*) was ever authority it has been overruled by that decision. In this we do no agree with plaintiffs. Schreifer *vs.* Wood (*supra*) was cited by plaintiff in error in that case. The plaintiffs in that case contended that white lead, nitrate of lead, oxide of zinc, and dry and orange mineral were manufactures of metals. The court says: "When the act speaks of 'manufactures of metals' it obviously refers to manufactured articles in which metals form a component part." The court held that these articles had become chemical ingredients of a new form, in which metal was not a component part.

These articles also appear to have been dutiable under other sections of the tariff act.

It is not claimed by plaintiffs that the article imported in this case has lost its component parts of bone, and become a new article, but, on the contrary, they contend that it is *calcined bone,* and for that reason exempt from duty, under the subdivision of section 2505 Revised Statutes 1878, page 483, which places the bones therein specified on the free list.

The scientific references of counsel for plaintiffs establish without doubt that component parts of the bone were left after calcination.

> There remains a black mass, consisting of an intimate mixture of charcoal, containing nitrogen, with the *mineral* matter of the *bone*. (Watts's Chem. Dic., p. 624; Plaintiffs' brief, p. 6.)
>
> The residue in the vessels amounts to about 50 per cent. in weight of the original bones. (Johnson's Ency., vol. 1, p. 551; Plaintiffs' brief, p. 7.)

The evidence shows clearly that component parts of bone remained after calcination.

Enough has been presented to sufficiently show that the case of Meyer *vs.* Arthur (*supra*) is not applicable here.

Sections 2504 and 2505 of the Revised Statutes (*supra*) ought to be construed together. By doing so the exemptions are easily determined. There is no doubtful meaning or ambiguity in the statute. It is plainly stated that "manufactures of bones" and "black of bone" are dutiable, with certain specific exemptions. Plaintiffs claim that the imported merchandise is *calcined bone*, and therefore free from duty, but the evidence shows it to be a different article, requiring additional steps in its manufacture to any of the statutory exemptions. It is a manufacture of bones, and chargeable with customs duties, no matter in what name it may have been assessed.

III.

That the court erred in directing the jury to find a verdict for the defendant upon the evidence at the conclusion of the testimony (*vide* exception, record, p. 25).

The ruling of the court, to which exception was reserved, and upon which the above assignment of error is made, reads as follows:

> The question in this case is whether bone-black is included in the clause "bones crude and not manufactured, burned, calcined, ground, or steamed," in the free list of section 2504 of the Revised Statutes. The evidence shows that it is made by subjecting bones after being steamed and cleaned to destructive distillation by heat in close vessels until all is expelled but the carbon, and then crushing that and assorting the pieces into proper sizes for clarifying sugar.
>
> Bones are understood to be calcined when they are subjected to heat in open vessels so as to produce bone-ash by being made friable, and to be burned when subjected to the direct action of fire. This distillation appears to be different from either, and the crushing and assorting is an important part of the process.
>
> By the whole a new article is made from bones. They are not treated thus for the purpose of securing them or making them portable, as grass is made into hay without becoming manufactured, as was held in Franzee *vs.* Moffit, 20 Blatchf., 267, or as apples are cut and dried, as in that case mentioned. The bones are manufactured into bone-black by processes of several steps. (Schreifer *vs.* Wood, 5 Blatchf., C. C. Reports, 215.) These steps amount to more than either of those allowed by the statute without making the result dutiable. For these reasons the jury are directed to find a verdict for the defendant.

There was no evidence to sustain the plaintiffs' cause of action in this case, and consequently nothing for the jury to weigh and consider.

Under such circumstances it was within the province of the court to direct a verdict for the defendant.

> It is enough that a verdict for the plaintiff would be against the clear weight and effect of the defensive evidence, whatever may be its character.
>
> But the practice * * * of directing a verdict in proper cases, when the evidence is all in, in favor of the party who may be entitled to it, seems never to have been questioned. (Cutler *vs.* Hurlbut *et al.*, 29 Wis. Rep., p. 165, and citations; Lamar *vs.* U. S., decided at this term by this court, and cases cited by defendant in argument.)

And it will be presumed that such direction was rightly given, and all instructions asked for plaintiffs rightly refused until the contrary *positively* appears.

The bill of exceptions must show that there *was* error. (Cutler *vs.* Hurlbut (*supra*) p. 153.)

There could have been no doubt about the facts in this case and the court did not commit error in directing a verdict for the defendant. Upon this point see the following references: (Dodge *vs.* Gaylord *et al.*, and the numerous authorities therein referred to, 53 Ind., pp. 377, 8, 9; Cutler *vs.* Hurlbut, 29 Wis. Rep., p. 153; Nicholas & Lee *vs.* Goldsmith, 7 Wend., p. 160.)

A recent decision rendered by Wheeler, *J.*, of the United States circuit court, southern district of New York, of date July 5, 1884, in the case of Peters *vs.* Robertson, collector (not reported), is directly in point in the case now under consideration, and it is printed herewith as part of this brief.

A. H. GARLAND,
Attorney-General.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

WILLIAM R. PETERS
vs.
WILLIAM H. ROBERTSON. } 8053.

WHEELER, *J.:*

The importation in question was made in September, 1881. The article is well known as bone-black. By section 2504, Revised Statutes, "black of bone," or "ivory drop black" is made subject to a duty of 25 per cent. The duty was assessed at this rate. The plaintiff made protest that this article was free under the provisions of section 2505, exempting "bones crude and not manufactured, burned, calcined, ground, or steamed." "Animal carbon" (bone-black) was made free by the act of March 2, 1861, 12 Statutes at Large, 178, section 23. A duty of 25 per cent. was laid upon "bone or ivory drop black" by the act of June 30, 1864, 13 Statutes at Large, 202, section 10, an "act to increase duties." Animal carbon and bone-black by name disappeared from the free list. Ivory drop black is a pigment, and derives its name of drop from the mode of manufacture.

Bone-black is not shown, or known, to be anything like a pigment.

There is no such thing as bone drop black, as there is ivory drop black; nor is ivory drop black ever known as bone-black. The expression in the act of 1864 of bone or ivory drop black could hardly mean bone, or, in other words, ivory drop black. The more natural meaning

under the circumstances would seem to be that either bone-black or ivory drop black should be subject to a duty of 25 per cent. Still more would the expression of black of bone or ivory drop black, in the Revised Statutes, seem to have that meaning.

Black of bone could, as far as shown, be nothing but bone-black. The expression is the equivalent of bone-black or ivory drop black, 25 per centum. In this view the assessment was correct.

The protest raised the question whether this article came under the description of bones crude and not manufactured, burned, ground, calcined, or steamed. It was shown not to be bones ground or steamed. The question whether the description of bones crude and not manufactured or burned or calcined would cover it was submitted to the jury and found for the defendant. That was the question to be tried. (Davis *vs.* Arthur, 96 U. S., 148.)

The verdict should stand unless it is without evidence to support it, or is against the substantial weight and effect of the evidence. In Schreifer *vs.* Wood, 5 Blatchf., 115, it is held that bone-black is a manufacture of bones. That decision is decisive of this question unless bone black is specifically burned or calcined bone. Bones are exposed to heat in close vessels and charred to make bone-black. The process is a distillation and not a combustion. The bones are heated but not burned. The product is ground and assorted for use.

Bones are calcined by being burned or heated accessible to air. There was some conflict on the evidence as to how these terms were understood in commerce. The whole was submitted to the jury to find whether this ar-

ticle was included in the terms burned or calcined bone. The finding was well founded upon evidence, the effect of which was for the jury.

Under the circumstances the verdict cannot be set aside without an arbitrary exercise of the power of the court.

The motion must therefore be denied.

O